

# ADMINISTRATIVE LAW

FEBRUARY  
1954

BULLETIN • Vol. 6 • No. 2

ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

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## HOOVER COMMISSION TASK FORCE

The past year was characterized by an unusually large number of noteworthy administrative-law cases decided by the nation's highest tribunal. The most significant of them were two decisions dealing with different aspects of the Administrative Procedure Act *Heikkila v. Barber*, 345 U. S. 229 (1953); *Ramspeck v. Federal Trial Examiners Conference*, 345 U. S. 128 (1953). And both of them contribute significantly to what has been termed the erosion of that statute. Nor were the other decisions of the Court more favorable to the claims of the private parties. Indeed, except for two unimportant cases, the 1953 jurisprudence of the Supreme Court was characterized by judicial approval of administrative assertions of authority. Yet,

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if the case-law has not been particularly encouraging to those interested in vindicating individual rights even in an era of ever-expanding administrative authority, there have been other recent developments which appear to be more hopeful. The most important of them were the constitution by the second Hoover Commission of a Task Force to study the legal services and procedure of federal agencies and the call by the President of a Conference on Administrative Procedure. These bodies could well provide the impetus for a new movement for administrative-procedure reform similar to that which led to the enactment of the APA.

The Hoover Commission Task Force, which was set up on January 11, 1954, appears to be composed of a particularly strong group of men. It is headed by Judge James M. Douglas of St. Louis, a former Missouri Supreme Court Justice. Its other members are:

Herbert W. Clark, San Francisco attorney; Cody Fowler of Tampa, Fla., attorney and a former president of the American Bar Association; James M. Landis of Washington, attorney and former dean of the Harvard Law School; Carl McFarland of Missoula, Mont., president of Montana State University and a former Assistant United States Attorney General; Ross L. Malone Jr. of Roswell, N. M., attorney and former deputy United States Attorney General; David F. Maxwell, Philadelphia attorney and chairman of the House of Delegates of the American Bar Association; Harold R. Medina, judge of the United States Court of Appeals for the Second Circuit, David W. Peck of New York City, presiding justice of the Appellate Division, First Department, of the New York State Supreme Court; E. P. Tuttle of Atlanta, Ga., general counsel of the United States Treasury Department; Reginald Heber Smith, Boston attorney and director of the Survey of the Legal Profession; Dr. E. Blythe Stason of Ann Arbor, Mich., dean of the University of Michigan Law School; Edward L. Wright of Little Rock, Ark., attorney and member of the House of Delegates of the American Bar Association, and Dr. Albert J. Harno, dean of the University of Illinois Law School, Urbana, Ill.

Chief Justice Arthur T. Vanderbilt of New Jersey and George A. Roberts, New York City attorney, have been appointed consultants to the Task Force.

A major investigation by the Task Force with respect to administrative procedure should take as its point of departure the job done by the Attorney General's Com-

mittee in 1941. It would be both unnecessary and wasteful for the present inquiry to do over again any part of the earlier investigation's work. At the same time, there is great need today of a study complementing that of the Attorney General's Committee. Such a study should concentrate upon the effect which the APA has actually had upon the administrative process; what deficiencies and gaps there are in that Act as they are shown in the actual practice of the agencies; how those deficiencies and gaps can be remedied; and what, if any, other remedial legislation is needed in the field of administrative law. The Attorney General's Committee did extremely valuable work. But its Report and studies are now outdated. They were made before the war and before the APA. Administrative authority has grown by leaps and bounds since the Committee reported. We know that we have the APA; and we know how its provisions read on paper. What we do not know is whether and to what extent they have proven effective in practice in canalizing the great post-1941 growth of administrative power.

In a field such as this, where the Congress has enacted a general statute intended to remedy pre-existing shortcomings, investigation might well be based upon the provisions of that statute and the way in which they have operated in practice. Because of the comprehensive nature of the statute in question, such an inquiry will, of necessity, have to cover most of the important aspects of the subject of administrative procedure. The study contemplated would seek to determine the deficiencies in practice of the different sections

of the APA and how they might be remedied within the framework of the Act. But, since the Procedure Act was not intended as an all-inclusive code, there will remain some problems which have been unaffected by it. Hence, attention will also have to be given to the question of what remedial legislation, if any, will be necessary, in addition to the APA, to deal with such problems.

The study contemplated will thus be divided into two parts:

- 1) The major part: Inquiry into what measures are necessary to implement the effectiveness of the APA; and
- 2) What measures, in addition to the APA, are necessary in the field of administrative procedure.

The first of these should be based upon thorough investigation by the staff of the Task Force into the actual working of the APA in the procedures of selected agencies. Such investigation is essential if the inquiry is actually to proceed on a basis other than that of the academic wonderland of *a priori* assumptions. Public hearings, such as that contemplated by the Task Force, may be indispensable to enable points of view and grievances to be ventilated. By themselves, however, they can hardly provide the necessary factual basis upon which practically sound proposals for administrative-procedure reform can be made.

Inquiry under part (1) above, into the working of the APA, might well look into the following questions which have presented themselves in connection with its different sections:

*Section 2:* Are the exemptions from the Act justified? Upon what basis, if any, should exemptions from the APA be made?

*Section 3:* Are the criticisms that have often been made of the public information practices of the agencies justified? How can the loopholes in section 3 be plugged?

*Section 4:* Does this section really deal with the problem of procedure in rule-making? Has it in practice led to greater democratization of the rule-making process?

*Section 5 (a):* Have loose notice practices been eliminated by this section?

*Section 5 (b):* To what extent have pre-hearing and other settlement practices been adopted by agencies? Has this made for more expeditious administrative justice?

*Section 5 (c):* One of the crucial inquiries—Have its provisions provided for separation in practice as well as on paper? Does it go far enough? (Here, careful study should be made of the NLRB, the one example we have in recent years of complete separation. Most discussions of the question proceed upon *a priori* assumptions of the good or bad effects of complete separation. Here is the chance for a factual study in a controversial field to obtain the evidence necessary for an informed judgment on the matter).

*Section 5 (d):* Why have declaratory orders been issued so rarely? What is the remedy for the present situation where official advice normally remains unreliable?

*Section 7:* Are the powers given hearing officers adequate? Can more be done to ensure that practice on evidence will not be too loose? Should the legal residuum rule be expressly included in § 7 (c)? What

has been the effect of § 7 (d) upon the taking of official notice?

*Section 8 (a):* What is the actual process of decision in the different agencies? Has this section solved the problem of the first *Morgan* case? Is there needless duplication in the making of initial decisions by examiners, or have their decisions tended to be accepted as final? Should the initial-decision procedure be made compulsory in all cases?

*Section 8 (b):* Has it improved the oft-criticized tendency of some agencies to make inadequate findings? How can it be given "teeth"?

*Section 9:* What legal effect has it really had? How can it be made effective?

*Section 11:* Another key inquiry:—How can the present unsatisfactory situation with regard to examiners be remedied?

NOTE: The above are intended only as illustrative inquiries and not as an exhaustive list.

Inquiry under part (2)—i. e., into matters not covered by the APA—could, among other things, look into the following:

- 1) Uniform rules of administrative procedure.
- 2) Office of Administrative Procedure.
- 3) Representation before agencies.

A study into the matters listed above, if made properly, could well prove to be even more significant in the development of our administrative law than the landmark study of the Attorney General's Committee. That is true because, as has been suggested, it

can be devoted primarily to the improvement of existing legislation in the field, i. e., the APA. The results can thus be specifically directed to the Congress, and may have greater practical effect than the more general report of the Attorney General's Committee. In addition, the present Task Force has a rare opportunity really to come to grips with some of the fundamental problems—notably, that of the separation of functions—which the Attorney General's Committee appears to have soft-pedalled, probably because of its desire to get a report which could be concurred in by people of very different view points. Certainly, the political climate appears even more propitious today toward administrative-procedure reform than it was a decade ago. The tremendous expansion in administrative authority caused by the war and post-war emergencies has led people on both sides of the political party-line boundary to realize the need for safeguards. Proposals for such safeguards can meet a bi-partisan response today which was almost unthinkable a generation ago. It should not be forgotten that administrative law, like other branches of the law, has, to paraphrase Justice Cardozo, its periods of ebbs and flow. One of the flood seasons is now upon us. It is for this Task Force to gather up the driftwood and leave the waters pure.

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## RECOMMENDATIONS OF PRESIDENT'S CONFERENCE

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On April 29 of last year, the President issued a call for a Conference of representatives of the federal agencies, the judiciary, and the bar to study the subject of

administrative procedure. The President directed the Attorney General to select the agencies which were to designate delegates to the Conference and named directly as members three federal judges, twelve practising lawyers, and three federal trial examiners. Judge E. Barrett Prettyman, of the Court of Appeals for the District of Columbia, was designated as Chairman. Among the important matters which the Conference has been considering are the feasibility of uniform rules of agency procedure and the desirability of establishing an Office of Federal Administrative Procedure.

On November 23 and 24, 1953, the President's Conference adopted the following recommendations, which should be of interest to members of the Section:

#### RECOMMENDATION

##### *Calendar No. 1*

*From the Committee on Conference Organization and Procedure.*

The Conference recommends:

That every agency consider unnecessary delay, expense, and volume of records in adjudicatory and rule-making proceedings to be detrimental to the public interest.

#### RECOMMENDATION

##### *Calendar No. 2*

*From the Committee on Conference Organization and Procedure.*

The Conference recommends:

That every agency having adjudicatory or rule-making functions make a compre-

hensive and intensive study of its own procedure in order to discover and eliminate any unnecessary delay, expense, or volume of records which may presently occur in its proceedings.

#### RECOMMENDATION

##### *Calendar No. 3*

*From the Committee on Pre-Hearing.*

The Conference recommends that the agencies adopt the following rule or one of similar import:

In any proceeding the agency or its designated hearing officer upon its or his own motion, or upon the motion of one of the parties or their qualified representatives, may in its or his discretion direct the parties or their qualified representatives to appear at a specified time and place for a conference to consider

1. the simplification of the issues;
2. the necessity of amendments to the pleadings;
3. the possibility of obtaining stipulations, admissions of facts and of documents;
4. the limitation of the number of expert witnesses;
5. such other matters as may aid in the disposition of the proceeding.

The agency or its designated hearing officer shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties or their qualified representatives as to any of the

matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements; and such order shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.

## RECOMMENDATION

### *Calendar No. 4*

*From the Committee on Hearing Officers.*

The Conference recommends that the agencies:

Encourage hearing officers to call and conduct pre-hearing conferences and other conferences during hearings, with a view to the simplification, clarification, and disposition of the issues involved, and with a further view to the shortening of the proof on the issues.

## RECOMMENDATION

### *Calendar No. 5*

*From the Committee on Hearing Officers.*

*Definition of issues before hearing.*

The Conference recommends that the agencies:

Require, that in all proceedings the issues to be adjudicated be made initially as precise as possible, in order that hearing officers may proceed promptly to conduct the hearings on relevant and material matter only. Particularity should be required in complaints, answers, applications for rules or licenses, and petitions to intervene. In

proceedings in which there is only one interested party besides the agency, the orders setting hearings should clearly specify the issues to be heard.

## RECOMMENDATION

### *Calendar No. 6*

*From the Committee on Evidence.*

The Conference recommends that the agencies require with respect to all classes of proceedings in which it is practicable:

*Submission of documentary evidence in advance.* (1) That all documentary evidence which is to be offered during the taking of evidence be submitted to the hearing examiner and to the other parties to the proceeding sufficiently in advance of such taking of evidence to permit study and preparation of cross-examination and rebuttal evidence.

(2) That documentary evidence not submitted in advance in accordance with the requirement of paragraph (1) be not received in evidence in the absence of a clear showing that the offering party had good cause for his failure to produce the evidence sooner.

(3) That the authenticity of all documents submitted in advance in a proceeding in which such submission is required, be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

## RECOMMENDATION

### *Calendar No. 7*

*From the Committee on Hearing Officers.  
Interlocutory matters and interlocutory appeals.*

The Conference recommends that the agencies adopt the following practice:

1. Broad authority should be granted hearing officers to rule upon interlocutory matters which arise during the course of hearings, and interlocutory appeals from rulings should be reduced to a minimum.

2. Interlocutory appeals which the agency may entertain should be promptly disposed of.

## RECOMMENDATION

### *Calendar No. 8*

*From the Committee on Judicial Review.  
Certification and filing of record.*

The Conference recommends to the Judicial Conference of the United States that the several United States Courts of Appeals be urged to adopt a uniform rule providing in all cases where a petition to review an order of an agency of the Federal Government has been filed:

(1) the time within which the certified record is to be filed;

(2) that except where the applicable statute otherwise requires, the record certified may be shortened or abbreviated (a) as the petitioner and the agency involved may by written stipulation designate, or (b) as the court on motion of any party or on its own motion may order, to encompass only that part of the record before the agency which is necessary to enable the

court to pass upon the questions and issues raised by the appeal;

(3) that a supplemental record may be certified (a) as the petitioner and the agency involved may by written stipulation designate, or (b) as the court on motion of any party or on its own motion may order.

## RECOMMENDATION

### *Calendar No. 9*

*From the Committee on Judicial Review.  
Filing of briefs prior to printing of record.*

The Conference recommends to the Judicial Conference of the United States that the several United States Courts of Appeals be urged to adopt a uniform rule providing in all cases where a petition to review an order of an agency of the Federal government has been filed:

(1) that there may be filed in the case on stipulation of petitioner and respondent agency, or on order of the court on motion of any party or on its own motion, a joint printed appendix containing the matters of record relied on by the parties in their briefs and which the parties desire the court to read, such joint printed appendix to be filed within the time provided in paragraph (5) hereof;

(2) that when the petitioner or petitioners and the respondent agency so stipulate to the use of the procedure provided in (1) above, or when the court requires its use, such procedure shall be binding on all parties to the proceeding;

(3) that responsibility for the printing of the joint printed appendix shall be upon

petitioner, but such petitioner shall have no responsibility to include in the joint printed appendix any part of the record on behalf of any other party when such other party fails or neglects to supply to petitioner, not later than five days after the time prescribed by paragraph (5) hereof for the filing of the final brief in the cause in question, a clear and specific designation of the record to be printed on behalf of such other party; provided, however, that nothing in this rule shall be interpreted as altering any rule or practice with respect to costs;

(4) that the joint printed appendix shall be so indexed and paged as to make ready reference to the certified record accurate and clear;

(5) that the time for filing briefs and the joint printed appendix under this rule, except as otherwise permitted by the court, shall be as follows: petitioner's brief, within 40 days after the filing of the transcript of record with the court; respondent's brief, within 30 days after the filing of the brief for petitioner; petitioner's reply brief, within 15 days after filing of the brief for respondent; and the joint printed appendix, not later than 10 days prior to the time set for oral argument in the case;

(6) when the above practice is not agreed to by the parties, the court's rules, otherwise applicable, shall govern.

## RECOMMENDATION

### *Calendar No. 10*

*From the Committee on Hearing Officers.*

The Conference recommends to the Judicial Conference of the United States that

United States Courts be urged to encourage hearing officers and agencies in formal administrative proceedings to exclude irrelevant, immaterial and repetitious evidence.

## RECOMMENDATION

### *Calendar No. 11*

*From the Committee on Office of Federal Administrative Procedure.*

The Conference recommends to the President of the United States the establishment of an Office of Administrative Procedure, and that provision be made:

1. That the Office perform the following functions:

(a) carry on continuous studies of the adequacy of the procedures by which Federal agencies determine the rights, duties, and privileges of persons:

(b) initiate cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable, uniform rules of practice and procedure;

(c) collect and publish facts and statistics concerning the procedures of the agencies;

(d) assist agencies and this Conference in the formulation and improvement of their administrative procedures.

2. That the Office shall be established in the Department of Justice under the supervision of the Attorney General.

3. That the Office of Administrative Procedure shall consist of a Director and a staff.

4. That the Director shall be appointed for an indefinite term.

5. That the Director shall make appropriate arrangements for securing the advice of representatives of the agencies, the bar, and other interested persons, in connection with the performance of his duties.

6. That it be the duty of each agency promptly to furnish to the Director all information on its administrative procedures which he may request and to assist him by all appropriate means.

### RECOMMENDATION

#### *Calendar No. 12*

*From the Committee on Trial Problems.*

The Conference recommends:

That the agencies require agency counsel to prepare in advance of hearings adequate detailed trial briefs in appropriate cases.

### RECOMMENDATION

#### *Calendar No. 13*

*From the Committee on Trial Problems.*  
*Indexing of Records.*

The Conference recommends that the several agencies adopt the following practice:

(1) In any formal proceeding in which it is anticipated that the record will exceed 2,500 pages, provision should be made either through counsel for the parties or the staff of the agency for a daily or current index of the record which will be available to the hearing officer and all counsel.

(2) The index should be topical (not a

digest), and as a minimum, each topic of testimony should be the heading of a card on which the name of each witness who testified upon the topic should be entered, the page of the record where each portion of his testimony appeared, and the number of each exhibit relating to the topic. The index should contain, on separate cards, the name of each witness and the topics on which he testified.

### RECOMMENDATION

#### *Calendar No. 14*

*From the Committee on Trial Problems.*

The Conference recommends:

That the agencies define by rule the status of agency counsel in the following respects:

1. the authority of agency counsel to participate in the proceedings;

2. whether such participation is to be mandatory or permissive;

3. whether, and under what circumstances, agency counsel need be served with any notices or other papers;

4. the extent to which agency counsel may or should take an advocate position or should confine himself to development of relevant materials;

5. the authority of agency counsel to stipulate as to facts or testimony; and

6. the authority of agency counsel to settle controversies or transmit offers of settlement to the agency or its authorized officials.

## RECOMMENDATION

### *Calendar No. 15*

*From the Committee on Evidence.*

The Conference recommends that the agencies adopt the following rule or one of similar import:

#### *Excerpts from documentary evidence.*

When portions only of a document are to be relied upon, the offering party shall prepare the pertinent excerpts, adequately identified, and shall supply copies of such excerpts, together with a statement indicating the purpose for which such materials will be offered, to the hearing examiner and to the other parties. Only the excerpts, so prepared and submitted, shall be received in the record. However, the whole of the original document should be made available for examination and for use by opposing counsel for purposes of cross-examination.

## RECOMMENDATION

### *Calendar No. 16*

*From the Committee on Trial Problems.*

The Conference recommends:

That the agencies maintain an adequate and detailed attorney's manual for the guidance of agency counsel.

## RECOMMENDATION

### *Calendar No. 17*

*From the Committee on Trial Problems.*

The Conference recommends:

That the agencies establish in-service training for agency counsel, including sys-

tematic regular instruction for newly-hired attorneys over a definite period of time and periodic, recurrent "refresher" courses or "trial clinics" for more experienced trial attorneys.

## RECOMMENDATION

### *Calendar No. 18*

*From the Committee on Trial Problems.*

The Conference recommends:

That the agencies publish for the use of practitioners before the agency, practice manuals of an advisory nature, detailing the procedural steps involved in all types of proceedings had under each statute administered by the agency, together with customary forms.

## RECOMMENDATION

### *Calendar No. 19*

*From the Committee on Trial Problems.*

The Conference recommends:

That the agencies cooperate in all feasible ways with universities and local or national bar associations undertaking to conduct practicing lawyers' institutes or courses in specialized fields of administrative law.

## RECOMMENDATION

### *Calendar No. 20*

*From the Committee on Trial Problems.*

The Conference recommends:

That the agencies sponsor, arrange and conduct more or less informal meetings or conferences on a local, regional or national

basis between responsible officials and members of the agency bar as an exercise of good public relations and to facilitate the creation of an atmosphere of understanding and cooperation.

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## OFFICE OF ADMINISTRATIVE PROCEDURE COMMITTEE REPORT

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The most controversial question thus far considered by the President's Conference has been that of the establishment of an Office of Administrative Procedure in the Federal Government. The Conference, in its eleventh recommendation, proposed the creation of such an Office substantially in the form recommended by its Committee on Office of Federal Administrative Procedure. The Report of that Committee was not, however, adopted till after a heated discussion of a Minority Report, submitted by J. Earl Cox, a member of the Committee. Because of the importance of the matters covered by them, it is felt appropriate that both the Report of the Committee on Office of Administrative Procedure and the Minority Report of Mr. Cox be printed in this issue of the Bulletin.

### Report of the Committee

The Committee has submitted to the Conference a recommendation that there should be established in the Federal Government an Office of Administrative Procedure. This report is submitted to the Conference in explanation of the Committee's recommendations.

### Background

The question of whether it would be useful and desirable to establish in the Federal government an Office of Administrative Procedure, was placed before the Conference by Attorney General Brownell in his address to the opening session of the Conference on June 10, 1953. At the same time, the Attorney General urged the Conference to consider whether there should be transferred to such an Office, if established, the functions with respect to hearing examiners which are presently performed by the Civil Service Commission under Section 11 of the Administrative Procedure Act.<sup>1</sup> The pertinent portions of

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<sup>1</sup> Section 11 reads as follows:

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

the Attorney General's address are set forth as Appendix A to this report.

On June 10, 1953, the Conference by resolution adopted for study the suggestion of the Attorney General. On June 11, Judge Prettyman, Chairman of the Conference, assigned the problem to a committee composed of the following persons:

John A. Danaher, Chairman, Bar

Burton C. Bovard, Federal Housing Administration Housing and Home Finance Agency

J. Earl Cox, Examiner

William F. Finan, Bureau of the Budget  
Robert W. Ginnane, Department of Justice

Nathaniel H. Goodrich, Department of Defense

Gladys A. Harrison, Department of Health, Education and Welfare

John W. Kopecky, Housing and Home Finance Agency

Karl D. Loos, Department of Agriculture  
Bruce Wright, Department of the Interior

### The Historical Background

As the Attorney General noted, the creation of an Office of Administrative Procedure was one of the principal recommendations of the Attorney General's Committee on Administrative Procedure in 1941.<sup>2</sup> The

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<sup>2</sup> *Final Report, Attorney General's Committee on Administrative Procedure*, Sen. Doc. No. 8, 77th Cong., 1st Sess., referred to hereafter as "Final Report".

texts and explanations of those recommendations are set forth in Appendix B to this report.

In 1942, Robert M. Benjamin recommended the creation of such an office in New York State as one of his principal recommendations arising out of a noteworthy study of administrative procedures in New York.<sup>3</sup> The text of Mr. Benjamin's recommendation is set forth in Appendix C to this report.

In 1944, the Judicial Council of California recommended to the Governor and the Legislature of that State the establishment of an office of administrative procedure such as had been recommended by the Attorney General's Committee for the Federal government and by Benjamin for New York. Uniquely, however, California, in 1949, enacted legislation creating a Division of Administrative Procedure with two functions: (1) to maintain a central pool of hearing examiners for use by agencies not requiring the full-time services of hearing examiners, and (2) to carry on continuous studies looking to the improvement of California administrative procedures.

The text of the recommendation of the California Judicial Council and the text of the California statute creating the Division of Administrative Procedure are set forth as Appendix D to this report. The subsequent annual reports of the California Division of Administrative Procedure indicate that while the Division's chief function is providing hearing examiners for many California agencies, and although the Divi-

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<sup>3</sup> *Administrative Adjudication in the State of New York (1942)*.

sion apparently has no separate research staff, it has been able to formulate a number of suggestions for the improvement of California administrative procedures.

In 1949, the Commission on organization of the Executive Branch of the Government (generally referred to as the Hoover Commission) recommended "that the Administrative Management Division of the Office of the Budget should, with the aid of carefully selected legal consultants, suggest ways and means to improve and thereby reduce the cost of disposing of business before administrative agencies."<sup>4</sup> The text of the Commission's discussion of this subject together with the text of the underlying task force report are set forth as Appendix E to this report.

### The Proceedings of the Committee

Your committee commenced its work by having prepared for its use a compilation of the conclusions and recommendations of other investigators of this subject. The committee had little difficulty in arriving at the general conclusion that it would be useful and desirable to establish an Office of Administrative Procedure to carry on continuous studies for the improvement of Federal administrative procedure. We were impressed by the beneficial results to the judicial system accruing from the systematic labors of the Judicial Conference of the United States and the Administrative Office of the United States Courts. We also noted that in several states, the studies and recommendations of State Judicial

Councils had produced results beneficial to the administration of justice. It was impressive that every Federal or state group from the Attorney General's Committee on Administrative Procedure in 1940 to the Hoover Commission in 1949 had concluded that systematic and continuous improvement of administrative procedures can be had only by making it the responsibility of a particular agency or unit.

Occasional studies, such as those of the Attorney General's Committee and of Benjamin, have been invaluable, but even their authors have urged provision for continuous effort to improve procedures. Congress has the time to act only occasionally in this field, and, when it does so, the fact that legislation relating to particular agencies is handled by different committees may be the cause of substantial departures from the degree of procedural uniformity created by the Administrative Procedure Act. See, for example, the 1947 amendments to the National Labor Relations Act, the 1952 amendments to the Communications Act, and Sections 236 and 242(b) of the Immigration and Nationality Act of 1952. Similarly, it seems fair to state that the potential accomplishment of such groups as this Conference is definitely limited by the fact that its members can devote only a portion of their time to its work. Indeed, it seems to us that such a Conference might operate most effectively in conjunction with a full-time Office of Administrative Procedure. Much of the achievement of the Judicial Conference is predicated upon the full-time staff work of the Administrative Office of the United States Courts. In this connec-

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<sup>4</sup> *Report on the Independent Regulatory Commissions*, House Doc. 116, 81st Cong., 1st Sess., pp. 10-11.

tion, we find apt the following language from *The Improvement of the Administration of Justice* (1952), a handbook prepared by the Section of Judicial Administration of the American Bar Association, pp. 37-38:

Since the members of judicial councils are persons actively engaged in other pursuits who are not compensated for their services on the council, the employment of a full or part-time secretary is important in order for effective work to be done. The research which many problems require, the collection of information from various sources, the preparation of programs, reports and agenda for consideration at the council meetings, and by legislative bodies and the courts, and other activities of a similar character call for more time and attention than the members are ordinarily able to give. Their services are best utilized in deciding what program should be undertaken, in determining questions of policy, in examining and weighing the material bearing on problems under study, and in solving the problems after the spadework has been done.

Thereafter, we considered at length the precise functions and powers of an Office of Administrative Procedure, how it should be created, how it should be composed, and where it should be located in the Federal government.

### The Hearing Examiner Functions

Underlying and perhaps crucial to some of these issues was the question of whether

we should recommend the transfer to an Office of Administrative Procedure, if established, the functions with respect to hearing examiners which are now vested in the Civil Service Commission by Section 11 of the Administrative Procedure Act.

This last question was inescapable. It was involved in the recommendations of the Attorney General's Committee on Administrative Procedure in 1940. The Attorney General had posed it in his speech to this Conference. The Civil Service Commission's administration of Section 11 had incurred, rightly or not, the criticism which is summarized and reviewed in Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 Harv. L. R. 737 (1950). The litigation between the Civil Service Commission and the Trial Examiners' Conference resulted in the Supreme Court affirming the Commission's interpretation of Section 11 in several major respects (*Ramspeck v. Federal Trial Examiners' Conference*, 345 U. S. 128). Thereafter, Senator McCarran introduced S. 1708, 83d Cong., 1st Sess., under which hearing examiners would be appointed by the President with the advice and consent of the Senate. At the present time, the Administrative Law Section of the American Bar Association is polling its members for their preference as to (1) continued administration of Section 11 by the Civil Service Commission, (2) transfer of the Section 11 function to someone else—such as an Office of Administrative Procedure if established, or (3) S. 1708.

The Committee concluded that in determining whether to recommend a transfer

of examiner functions from the Civil Service Commission to an Office of Administrative Procedure, it must at least try to ascertain the principal defects, if any, in the past administration of those functions, and whether such defects could be corrected by the Civil Service Commission or were in some way inherent in the organization and staffing of the Commission. The Committee lacked the time for anything like a complete exploration of all hearing examiner questions. Moreover, any such survey would be outside the scope of our assignment. Because of the potential overlap of any such exploration with the work of the Conference's Committee on Hearing Examiners, Mr. Earl Kintner, Chairman of that committee was invited to participate in this portion of our work.

With this limited objective, we conferred informally with members and officers of the Interstate Commerce Commission, the Federal Communications Commission, and the National Labor Relations Board, as agencies employing large numbers of examiners. These conferences developed dissatisfaction with the administration of Section 11 in the respects discussed below. Thereafter, the Committee met informally with Mr. Philip Young, the new Chairman of the Civil Service Commission, and Mr. John Macy, the Commission's new Executive Director. The asserted deficiencies in the administration of Section 11 which were developed in the meetings with the three examiner-employing agencies, together with the Committee's views and suggestions, were stated in detail to Mr. Young and Mr. Macy. They in turn furnished much information as to the Commission's

experience with hearing examiner problems.

The Committee has heard four significant criticisms of the administration of Section 11 which, together with the Committee's suggestions, are as follows:

1. Agencies which are important employers of examiners expressed to us dissatisfaction with the more recent and current state of the Commission's hearing examiner register. The Commission certifies eligibles to agencies desiring to employ hearing examiners from a register which was closed on July 5, 1949. That is, for four years, no one, with a few exceptions, has been added to the register, which, in the meantime, has been depleted by selections and attrition (unavailability for one reason or another).

We have not made an independent evaluation of the present register. However, we are satisfied from our personal experience that the type of person who would make a good hearing examiner will not wait indefinitely for a hearing examiner appointment, but can and will find other attractive employment. We are informed that this is the only case in which the Commission has used a register for professional persons which has been closed for so long a time. Thus, even if the present closed register system is to be continued, a new register should, in our opinion, be established as soon as possible. In addition, considering the importance of obtaining the best possible applicants for hearing examiner positions, we believe that the Commission should consider employing in this field a more continuous system of examin-

ing and rating applicants for hearing examiner jobs. It is obvious that from time to time men who would make excellent examiners would be available for appointment if they could be examined and rated within a reasonable time.

It is the Commission's view, not without justification, that it should not undertake the substantial task of preparing a new hearing examiner register as long as there is any possibility that the enactment of S. 1708 or the studies of this Conference will result in the near future in an entirely different method of recruiting hearing examiners. However, within the next few years, the Interstate Commerce Commission will be required to appoint a substantial number of new examiners to replace retiring examiners. Agencies engaged in dynamic and expanding fields such as the Federal Communications Commission, will have sudden needs for additional examiners. Accordingly, considering the importance of recruiting the best available men as hearing examiners, as well as the time required to set up any kind of new register or roster, the Committee has suggested that the Civil Service Commission proceed without delay to establish a new hearing examiner register.

2. It is a common complaint that there have been excessive delays in the administration of hearing examiner promotions by the Civil Service Commission. Under Section 11, as interpreted by the Attorney General in his opinion dated February 23, 1951, if the employing agency decides to fill a hearing examiner position in a higher grade by the promotion of one of its ex-

aminers in the next lower grade, the Civil Service Commission must make an independent judgment as to which of such examiners is to get the promotion. We were informed that the Commission's investigations to determine which examiner should be promoted, plus the determination of appeals by examiners who were not promoted, have in some cases consumed many months, in contrast with the relatively expeditious procedures for promoting other types of government employees. We think that the agencies are properly concerned, and that the administrative process suffers, because of the adverse effect of such delays upon the morale of the hearing examiner staffs.

We were informed by the Civil Service Commission that much of the delay in making hearing examiner promotions was caused by the pendency of litigation (*Ramspeck v. Trial Examiners Conference, supra*) challenging the legal basis for making any promotions of hearing examiners, and that with the termination of that litigation the time involved in making promotions has been reduced substantially. It is obviously difficult for an outside agency, which lacks opportunity for continuous observation of the work of the hearing examiners employed by a particular agency, to come in at irregular intervals and select examiners for promotion. It is a time-consuming, and not necessarily adequate process of making a comparative review of documentary records compiled by the competing examiners and of collecting the opinions of agency officials and private persons who have observed the examiner's work. We suggest that this promotion procedure could be expedited by the maintenance of performance

statistics for hearing examiners and the careful use of work standards developed from such statistics. Also, we are not satisfied that any purpose is served by allowing appeals by examiners who have failed to receive promotion-appeals which are not allowed to other classes of Federal employees and which delay the effective date of promotions. More broadly, in view of the importance which Congress has attached to the determination of hearing examiners' compensation by the Civil Service Commission, rather than by the agencies which employ them, we believe that the Commission should not hesitate to take whatever steps may be necessary to insure that such promotions are made within a reasonable time.

3. We are informed that some Federal agencies have in their employ some hearing examiners with whose work output they are dissatisfied, but that they feel powerless under Section 11 to take any effective action in such situation. It should be emphasized that no agency has made such a statement with respect to its examiner staff as a whole. One agency presented to the Committee statistics indicating a startling variation in hearing examiners' work output as measured by reports written and number of days spent in hearings.

Section 11 provides that "Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission \* \* \* after opportunity for hearing and upon the record thereof." No hearing examiner has been removed under Section 11. Section 11 also forbids

the use of the usual agency efficiency ratings. However, we do not believe that Congress intended to relieve both the agencies and the Civil Service Commission from responsibility for insuring high standards of performance by hearing examiners. We believe that nothing in Section 11 was intended to prevent, for example, the compilation by the employing agency, the Commission, or both, of statistics which will measure the work of hearing examiners in such objective respects as days spent in hearings and number of reports written. Such figures, used as the basis for establishing work standards, with adjustment for such distorting factors as illness and abnormal cases, should provide over a period of time much of the basis for both promotion and removal actions. Admitting that in this field there are factors of personality and temperament which cannot be appraised by minor variations in such statistics, we believe that where there appears continued and substantial downward deviation by an examiner from the average for his group, it should be regarded, absent a convincing explanation, by both the employing agency and by the Civil Service Commission, as "good cause" justifying his removal in accordance with Section 11. Agencies, with responsibility for achieving results within the budgetary limitations established by Congress, cannot afford to be indifferent to the efficiency of hearing examiners, nor can the Civil Service Commission which, under Section 11, bears the responsibility for the removal of examiners who do not perform their duties satisfactorily. Such action, if taken where necessary, will enhance the standing of

competent and hard-working examiners and will make the job more attractive for able men.

4. The committee is informed that all or practically all of the work of rating applicants in the compilation of the hearing examiner register and in the evaluation of the work of incumbent hearing examiners for promotion purposes, has been performed by employees of the Civil Service Commission who are specialists in personnel examination and classification, and that few if any of these Commission employees have had experience as lawyers in administrative hearings or in related legal phases of administrative proceedings.

We believe that it will be no reflection on the Commission or its staff to suggest that the Commission would be assisted in its performance of these functions by regularly obtaining the advice of agency officers and members of the bar who, from first-hand experience in administrative procedures, have a unique appreciation of the functions performed by hearing examiners, as well as of the personal and professional qualities which make a good examiner. We are not at all sure that it would be feasible for such persons to participate in the case-to-case decisions which are now made by the Commission's staff. However, we are confident that an advisory committee composed of such persons could make useful recommendations on questions of general policy and procedure. Section 11 of the Administrative Procedure Act expressly authorizes the Commission to utilize advisory committees.

As stated above, the committee felt compelled to explore these matters in order to make a responsible recommendation as to whether the hearing examiner functions under Section 11 should be transferred to an Office of Administrative Procedure. For the reasons set forth below, we recommend against such a transfer at this time:

1. We have set forth certain specific criticisms of the past administration of Section 11. At this point, it should be noted that the Civil Service Commission has a new top management which, it is well known, has scarcely had any opportunity for a thorough reconsideration of the application of Section 11. We are unwilling to conclude that any of such criticisms are inherently beyond correction by the Civil Service Commission. Thus, we referred critically to the use of a register for hearing examiner eligibles which has been closed since 1949. We are informed that there are no legal obstacles to the Commission establishing a new register at more frequent intervals or, indeed, a system of continuous recruitment and rating of applicants.

We have referred to excessive delays in the Commission's selection of examiners for promotion. To the extent that this condition has not been corrected, it involves, at the most, the use of additional manpower in that process, or, as we are inclined to believe, collaboration between the Commission and the employing agencies in the development of at least semi-objective work performance statistics as a partial substitute for the analysis of paper records and the collection of general and subjective opinions from agency officers and private

persons who are familiar with the hearing examiners' work.

Similarly, we noted our impression that neither the Commission nor the employing agencies had fully faced up to their joint responsibilities for insuring that each Federal hearing examiner does a good job or is removed for cause in accordance with Section 11. In this respect, also, we see no inherent obstacle to effective action by the Commission. At this point we should state that we have not explored, and therefore express no opinion upon, the internal organization of the Civil Service Commission for the performance of its hearing examiner functions. We recommend that the Commission itself explore this aspect of the problem.

2. The Committee is agreed that in any event there should not be a *complete* transfer of hearing examiner functions from the Civil Service Commission to an Office of Administrative Procedure or to anyone else. Particularly in connection with the investigation and rating of applicants for hearing examiner positions, there is involved a great deal of routine investigation of applicants, e.g., as to their health and their reputation in their home communities in such respects as sobriety and honesty. This kind of investigation requires a field staff such as the Civil Service Commission already possesses, and there would be no point in duplicating such investigative facilities in an Office of Administrative Procedure.

Moreover, we see no reason why the second phase of the rating process, i.e., the assembling of the paper record of each ap-

plicant's professional career, cannot be handled at least as well by the staff of the Civil Service Commission as by anyone else.

These practical considerations indicate, we believe, that the question is not simply one of leaving the Section 11 hearing examiner functions in the Civil Service Commission or transferring them to some other agency. Rather, considerations of economy require that the existing personnel facilities of the Commission be used as far as possible. On this analysis, any change in the present administration of Section 11 would involve adding to that administration the contribution of persons thought to possess certain skills or experience not found in the Commissions' staff.

3. We believe that an Office of Administrative Procedure should have an opportunity to establish itself and organize a program of procedural studies before there are imposed upon it the difficult and controversial hearing examiner functions under Section 11. The latter functions, if transferred at the outset to a new office, are likely to absorb its energies and relegate effort for the improvement of procedures to a minor role.

4. Later in this report, we express a preference for the initial creation of an Office of Administrative Procedure by executive action. It should be emphasized that this recommendation is not based upon any doctrinaire preference for executive action over legislation. We simply recognize that, in view of the demands on the time of Congress, executive action might precede Congressional action by one or two years. However, the transfer to such an

office of the hearing examiner functions vested by Section 11 of the Administrative Procedure Act in the Civil Service Commission could not be accomplished by executive action; it would require a statute or a reorganization plan. Since any proposal to so transfer hearing examiner functions is likely to uncover divergent points of view, the best prospect for the early establishment of such an office (i.e., by executive action) lies in not coupling with the initial creation of such an office the transfer to it of the hearing examiner functions under Section 11.

Having determined to recommend the early creation of an Office of Administrative Procedure without transferring to such an office the hearing examiner functions under Section 11, we turned to the organizational details.

*Method of creation.* As indicated earlier in this report, we would prefer that an Office of Administrative Procedure be established by executive action. We have not expressed this preference in a formal recommendation because the method of creation may involve practical considerations beyond the competence of this Committee. We suggest creation by executive action rather than by legislation primarily for the reason that it can be done sooner by executive action. We recognize that statutory authorization for the office may be ultimately desirable. However, such an office is an experiment, and it may be desirable to permit the office to operate on a flexible basis for an initial period while experience indicates the provisions which should be embodied in legislation.

*Functions.* We have recommended (Recommendation 1) that the Office be empowered in broad terms to carry on continuous studies looking to the improvement of Federal administrative procedures, and to act as a central source of information on administrative procedures for Congress, the executive agencies and the public. In addition, we recommend that the Office be directed specifically to "formulate to the extent feasible, and recommend to the agencies or to Congress, as appropriate, uniform rules of practice and procedure;". This Conference has assigned to one of its committees the question of whether and to what extent it is feasible and desirable to establish uniform rules of procedure for Federal agencies. That committee is not attempting itself to draft such uniform rules; rather, its report and recommendation will point out those aspects of procedure as to which it believes uniform rules will be feasible and desirable. Such a recommendation and report, no matter how well done, will have little practical value unless there is a follow-up on its affirmative conclusions. It is clear that the actual formulation of such rules will involve detailed investigation and careful drafting such as can be performed only by persons who can devote to the job as much time as is necessary. Accordingly, we recommend that the Office be directed specifically to carry on this work.

In our Recommendation 7, we recommend that the Office be directed to initiate without delay a cooperative effort in conjunction with the Civil Service Commission and the agencies employing hearing examiners for the improvement of policies and procedures

with respect to the recruitment, promotion and tenure of hearing examiners, with particular reference to the deficiencies discussed earlier in this report. The reason for this recommendation is that we have sensed a lack of coordinated effort between the Commission, the employing agencies, and the bar to establish and maintain the best possible system of hearing examiners. Here, as in other phases of the administrative process, there has been a tendency for everyone concerned to "go it alone" with little sharing of ideas and experience. We recommend that the Office of Administrative Procedure, while not assuming the burden or legal responsibility for the administration of Section 11, should be charged specifically with encouraging a more cooperative approach to hearing examiner problems than heretofore has been employed.

It should be emphasized that under our recommendation the Office of Administrative Procedure would have no power to impose particular procedures or rules of procedure upon any agency. The Office should be empowered only to investigate and recommend; it should not be empowered to command. We do not believe that the Office should be given powers which will dilute the responsibility of the operating agencies to the President and Congress for the performance of their functions. We are confident that the agencies will be receptive to sound suggestions which are the result of thorough investigation. Certainly, the Office should be established initially upon that assumption. Accordingly, we have recommended (Recommendation 6) that the

only positive power of the Office be the power to obtain information from the agencies.

*Location.* We have recommended (Recommendation 2) that the Office of Administrative Procedure be established in the Department of Justice under the supervision of the Attorney General. There seemed to be three possibilities for the location of the Office in the framework of the Federal Government: (1) as an independent agency, (2) in the Bureau of the Budget, or (3) in the Department of Justice. The Attorney General's Committee had recommended that such an office be established as an independent agency, but that recommendation was coupled with the view that the hearing examiner functions now performed by the Civil Service Commission should be vested in such office. Absent the hearing examiner functions, we believe that such an office should be located within an existing executive agency. The Hoover Commission would have vested the function of improving administrative procedures in the Bureau of the Budget; in that proposal, the improvement of procedures was associated with the improvement of agency organization and management—functions which clearly belong in the Bureau of the Budget and which would be unaffected by our recommendations. In favor of placing such an office or its functions in the Bureau of the Budget is the fact that fair and expeditious procedures are related to the internal organization and management to a greater extent than is generally realized. Counterbalancing this consideration is the fact that practically all aspects of admin-

istrative procedure as such have their roots in due process and statutory requirements. These matters are the subjects of constant litigation, much of which is conducted by the Department of Justice, and, less frequently, formal or informal opinions of the Attorney General. The balance is tipped, in our opinion, by the psychological factor that the practicing bar, whose support and cooperation is essential to the success of the Office, is accustomed more to dealing with the Department of Justice than with the Bureau of the Budget. Moreover, we do not view the Attorney General as merely a chief prosecutor but rather as having an affirmative obligation for the fair and efficient administration of Federal justice—an obligation which was reflected in this field as long ago as 1939 by the appointment of the Attorney General's Committee on Administrative Procedure.

We recommend, although we did not think it proper to do so in our formal recommendation, that such an office be established as a separate entity in the Department of Justice, with the Director reporting directly to the Attorney General. Otherwise, we are afraid that the office, as a small unit in a large division, eventually will be relegated to obscurity.

*Composition of the Office.* We recommend (Recommendation 3) that the Office shall consist of a single Director and a staff.

If the hearing examiner functions under Section 11 were to be vested in the Office, we anticipate that many would prefer that the Office be headed by a board of three or

more persons, to avoid vesting such powers in a single individual. However, since we have recommended that the functions of the Office be limited generally, to making procedural studies and recommendations, we think that considerations of efficiency suggest the desirability of a single Director.

We visualize the Director as an experienced lawyer. He should thoroughly understand the administrative process, but even more important he should possess common sense and the ability to work constructively with Congress, the agencies and the bar. We think that he should have a small staff—two to four lawyer investigators, a statistical clerk and stenographic assistance. We do not expect him to achieve great reforms over night. Rather, we expect that over a period of years, acting as a nucleus for cooperative effort, and dealing with a few particular problems at a time, he can do much to improve administrative procedures. Rather than working through a large and self-centered staff, he should work constantly through advisory committees composed of representatives of the agencies and the bar—thereby obtaining not only different points of view but also understanding and support of the work of the office. With this in mind, we have recommended (Recommendation 5) that the Director be empowered expressly to appoint a standing advisory committee and other advisory committees including representatives of the agencies and the bar.

We have no settled opinion as to whether the Director should be appointed by the President or by the Attorney General, or

for a fixed term and, if so, for how long a term. After an initial period of actual operation of such an office, the answers to these questions may be determined in time for inclusion in the legislative authorization which we hope the Office ultimately will have.

We are convinced that the establishment of an Office of Administrative Procedure to act as a nucleus for continuing effort to improve administrative procedures is the most important contribution which can be made to this branch of the law. Someone has said that if such an office is established, 20 years from now we shall ask each other how we got along without it.

Respectfully submitted,  
John A. Danaher,  
Chairman.

[*Editor's Note:* Because of space limitations, the Appendices contained at the end of the Report have been omitted.]

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## OFFICE OF ADMINISTRATIVE PROCEDURE MINORITY REPORT

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There is substantial agreement that an office of Federal Administrative Procedure might well perform important functions in the administrative process.

As to the functions which such an Office should undertake, there has not been, and is not now, unanimity of opinion. There was and is a strong feeling that the hearing examiner functions now exercised by the Civil Service Commission under Section 11 of the Administrative Procedure Act should be transferred to such an Office. There is

feeling also that the hearing examiners, even though assigned to the various agencies, should work under the supervision and control of the Office.

Only under such an arrangement can the work of the hearing examiners be independently carried on, and only under such an arrangement can the hearing examiners be freed of the influences and pressures to which they may be subjected under the present system in which their appointment, compensation and promotion, even their tenure, are subject to determination by the agency against which they may be called upon to decide in the cases which come before them. The ends of justice are not readily served when the judicial officer who decides cases is on the payroll of one of the litigants nor can the public have confidence in the administrative process when such conditions exist.

That the hearing examiners' functions should be transferred to the Office of Federal Administrative Procedure is implicit in the Committee's report. Although there was another committee assigned to study and report on the hearing examiner question, pages 7 to 18 and other portions of the report of the Committee on Office of Federal Administrative Procedure are devoted to that subject. Since the ultimate transfer of hearing examiner functions to the Office is contemplated by the committee, that situation ought to be faced squarely now by the Conference, and not delegated or relegated for study and consideration to a temporary Office of Administrative Procedure, such as is contemplated in the Committee's recommendation.

The Attorney General, in his address to the Conference on June 10, 1953 (Committee's Report, Appendix A, p. A-2), said:

“\* \* \* It may be that an Office of Administrative Procedure, which engaged in continuous study of the entire administrative process, would be better equipped than anyone else to perform these important functions with respect to trial examiners.”

The Attorney General's Committee, in its 1941 report (App. B, p. A-6), so recommended:

“In addition to these general duties of investigation and collection of data, the Committee recommends, as discussed in chapter IV of this report, that there be vested in the Office of Administrative Procedure important duties with respect to the selection and removal of hearing commissioners.”

See also the Attorney General's Committee's recommendation, on page A-11, Appendix B of the Committee's report:

“(3) *Selection and appointment.*—A hearing commission may be selected and appointed without regard for the provisions of the civil service or other laws applicable to the employment and compensation of officers and employees of the United States. He shall be nominated by the agency, and shall be appointed by the Office of Federal Administrative Procedure if that office finds him to be qualified by training, experience, and character to discharge the responsibilities of the position. The director is authorized and instructed to make such investigations as may be necessary in order to enable the office to pass upon the qualifications of nominees.”

The Judicial Conference of California contemplated that such an office should maintain a staff of qualified hearing officers, in its proposal (App. D, p. A-19), as follows:

“The statute proposed by the Council has two major purposes: (1) to provide for the continued improvement of administrative procedure, and (2) to maintain a staff of qualified hearing officers available to all State agencies.”

The State Legislature of California, by Act effective October 1, 1949, established a division or department of administrative procedure, which, in Section 110.5 (App. D, p. A-22), provides:

“The department shall maintain a staff of hearing officers qualified under Section 11502 of the Government Code, who, together with any additional employees assigned for that purpose, shall constitute the Division of Administrative Procedure. The department may employ hearing officers on a permanent, part-time or intermittent basis and shall maintain a staff which is sufficient to fill the needs of the various state agencies.”

#### *Proposed Amendment No. 2:*

The Office of Federal Administrative Procedure should be an independent agency under the Chief Executive, and established by law. The Attorney General's report of 1941 so recommends, as is acknowledged in the Committee's report, page 21. The recommendation of the Attorney General's Committee (App. B, p. A-5) is:

“To this end the Committee recommends that there be established by law an Office of Federal Administrative Procedure somewhat comparable in

dignity and responsibility to the Administrative Office of the United States Courts."

Attorney-General Brownell must have so contemplated such an office in his address to the Conference on June 10, 1953, when he said (App. A, p. A-1) :

"You will recall that the creation of such an office was recommended by the Attorney General's Committee on Administrative Procedure in 1941.",

and in his suggestion on page A-2, when, in referring to the hearing examiner functions now performed by the Civil Service Commission, he said:

"\* \* \* It may be that an Office of Administrative Procedure, which engaged in continuous study of the entire administrative process, would be better equipped than anyone else to perform these important functions with respect to trial examiners."

Mr. Benjamin, in his recommendation for a Division of Administrative Procedure in the Executive Department of the State of New York (App. C, p. A-16), said:

"I recommend setting up in the Executive Department a new division, which might be called the Division of Administrative Procedure, headed by a Director of Administrative Procedure appointed by the Governor and holding office during his pleasure."

The Judicial Council of the State of California (App. D) so recommended, and the State Legislature of California so provided. The California Judicial Council considered the possibility of delegating the functions of the Office to the State Department of Justice, but advised against this, (App. D, p. A-20), saying:

"The Department of Justice now has the duty of prosecuting cases before many agencies and it would be difficult to achieve a separation of functions between the prosecuting deputies and hearing deputies. Even if separation was achieved in fact, the appearance of unfairness would remain if both prosecuting and hearing functions were vested in the same department."

While the Federal Department of Justice is not frequently engaged in the prosecuting of cases before the various agencies, yet it does represent those agencies in the courts when their decisions are appealed or their orders violated.

The Hoover Committee, in its Task Force Report (App. E, p. A-24), contemplated the establishment of a special Office on the Operations and Organizations of the Administrative Regulatory Agencies, saying:

"Their problems are sufficiently different from those of the regular executive agencies to require separate examination, and the problems of the various regulatory agencies are similar enough to make their experience helpful to each other.",

and on page A-25:

*"In our opinion, the proposed program is likely to be more effective if administered by a separate Office of Administrative Procedure in the Executive Office of the President"* (Underscoring supplied).

The various groups which have given this subject the careful consideration which it deserves appear to be unanimous in their belief that the Office should be independent, and not an adjunct of any other agency or department of the Government, subordinate

and responsible only to the President of the United States.

These recommendations conform to establish concepts of administrative justice. Administrative processes, like court processes, to be effective, should be as far removed as possible from political influences and pressures. That was one of the motivations for the enactment of the Administrative Procedure Act. As expressed at the last meeting of the American Bar Association, that was one of the moving reasons why the American Bar Association did not approve the pending legislation designed to make the hearing examiners subject to presidential appointment. Any step which would make the administrative processes subject to the prevailing political administration would be a step backward.

The Administrative Procedure Act marked an important step forward toward the goal of independence of hearing officer, impartial adjudication and fair hearing. The establishment of an independent office of Federal Administrative Procedure will be a second important step in the same direction.

More and more the rights and privileges of the public are affected by the administrative processes. See Page 37 of the Nov. 1953 issue of "Nations Business", article by James T. Rogers entitled "Trial Examiners' Impact on Business Grows." More and more these processes should approach the ideals which have been embodied in our judicial system. This in no way impugns the honor and dignity of the Office of the Attorney General or the Department of Justice; but that office and department represent the legal arm of the Government, not

only in an advisory capacity, but as its prosecuting staff. The administrative processes should be removed from such environment so far as its hearing officers are concerned.

The Committee's report recognizes that the establishment of an Office in the manner which it recommends is not an ultimate solution of the problems which this Conference faces. It states (Report, p. 23):

"\* \* \* After an initial period of actual operation of such an office, the answers to these questions may be determined in time for inclusion in the legislative authorization which we hope the Office ultimately will have."

The Committee has declared that the establishment of an Office of Federal Administrative Procedure is of immediate urgency, in order that the Office may carry on the studies which have been started by this Conference. That suggestion is of doubtful validity. There are other means by which those studies can be continued. This Conference consists of representatives of the judiciary, the agencies, the Bar, and the hearing examiners. The Office as recommended, under the Attorney General, would not consist of such representative personnel, and could not give the administrative problems the broad consideration which is afforded by the Conference. Any further studies that are carried on should be conducted by a group similar in composition to the Conference. If the establishment of the Office of Federal Administrative Procedure by legislation requires time, that time should be fruitfully productive because of the continuing studies which will be made—studies not only by this Confer-

ence, but studies by the American Bar Association and other Bar groups—studies by interested representatives of the public, whose rights and privileges are affected by the administrative processes—and studies by the appropriate and interested committees of the Congress. There should be no curtailment of the opportunity for such studies.

Furthermore, that time element can be appreciably reduced if this Conference through the work of its Committee can present to Congress a carefully considered, carefully prepared draft of an appropriate bill. No greater, more effective or valuable contribution can be made by the Committee or by the Conference toward the accomplishment of the ideals of administrative justice. Such a contribution cannot be made by a temporary Office of Federal Administrative Procedure which would immediately be subjected to the suspicion of bias and self-aggrandizement and no suggestion or recommendation coming from such an office would have the validity or weight that one has coming from the well considered action of this Conference.

It seems to be reasonable that this Conference should have before it a draft of legislation which would clearly define the organization and functions of such an office before it comes to any *final* approval of its establishment either on a temporary or a permanent basis.

Recommendation 3 is minor, and pertains to some of the detail problems that will require solution in connection with the establishment of an Office of Federal Administrative Procedure, and are to be con-

sidered merely as suggestions or points of embarkation for any discussions that may arise later in the Committee or Conference or when the matter may come before the Congress for consideration.

The final recommendation that draft legislation be prepared by the Committee needs no further discussion.

Respectfully submitted,  
J. Earl Cox,

Member of the Committee on Office  
of Federal Administrative Procedure.

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## PRESIDENT'S CONFERENCE

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### Hearing Officer Questionnaire

*Note:* The following is included in the Bulletin at the request of Earl W. Kintner, Chairman of the Committee on Hearing Officers of the President's Conference on Administrative Procedure, which is interested in the views of the members of the Section with regard to the questions included in the Committee's outline. This is a matter apart from the views—limited to section members—requested for the help of this Section's Council in connection with S. 1708, 83d Cong., referred to at the end of this Bulletin. Submission of views to Mr. Kintner's Committee should be made without undue delay so that the Committee may have the opportunity for careful study before recommendations are prepared. If convenient, views and comments should be submitted in 10 copies:

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## PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE

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### *Committee on Hearing Officers*

Room 576, Federal Trade Commission  
Building

Pennsylvania Avenue & 6th Street, N. W.  
Washington, D. C.

### OUTLINE OF DESIRED INFORMATION ON THE STATUS OF FEDERAL HEARING OFFICERS

The following, in outline form, is a breakdown of the points which the Committee on Hearing Officers desires to be covered in comments by interested persons. Submissions of views should follow the outline so far as practicable. "Yes" or "No" answers should be followed by complete explanations. Full identity of persons addressing the Committee should be disclosed. Please indicate with which Federal agencies dealings are had.

#### *Qualifications and Recruitment*

What are your ideas with respect to the necessary qualifications of a hearing officer? Should hearing officers possess specialized qualifications to handle the work of agencies or is a general knowledge of the law coupled with judicial temperament sufficient? If specialized qualifications are needed, are they needed for all agencies? If not, are they needed for some agencies? If so, state which agencies and describe the qualifications.

What are the best sources of persons who would likely make competent hearing officers? How would you go about recruiting them?

#### *Selection and Appointment*

Do you favor continuation of the present system of selection and appointment of examiners under Section 11 of the Administrative Procedure Act as administered by the Civil Service Commission? If not, do you favor continuing the provisions of said Section 11 with respect to selection and appointment with changes in the Civil Service Commission's practices thereunder? What if any changes do you suggest?

Do you favor any amendment to Section 11 with respect to the selection and appointment of examiners? If so, do you favor selection and appointment of examiners by the President, by the agency, by an authority such as an Office of Administrative Procedure, or by any other method?

What are your ideas with respect to the appraisal of an applicant's qualifications prior to selection by a person or group of persons independent of the selecting authority? If you favor such a method, what are your ideas with respect to

- (a) composition of the appraising authority,
- (b) his or their qualifications,
- (c) method of his or their appointment, and
- (d) his or their tenure and compensation?

## *Administration*

Should a hearing officer

- (a) be an officer of the agency, as at present, or
- (b) be an officer of a central office, such as an Office of Administrative Procedure, but assigned to an agency on a permanent basis, or
- (c) same as (b) but assigned on a temporary basis?

Should a hearing officer's office be located

- (a) in the agency's quarters, or
- (b) in a separate central office?

If you favor selection and appointment of hearing officers by, and/or their being officers of, a central office, such as an Office of Administrative Procedure, should such an office be

- (a) an independent agency, or
- (b) placed within (1) The Department of Justice or (2) another executive department or agency?

As to the characteristics of such an office,

- (a) How should it be headed: by one person or several?
- (b) How should the head or heads be appointed?
- (c) What should be his or their qualifications?
- (d) What should be his or their tenure?

## *Tenure*

With respect to tenure, should a hearing officer serve

- (a) for life, or
- (b) for a term of years; if so, how many years, or

- (c) at the pleasure of some person; if so, whom?

## *Removal*

Should a hearing officer

- (a) be removed for cause; if so, should specific grounds be contained in charges?
- (b) be removed under the ordinary Civil Service reduction-in-force rules?
- (c) be entitled to a hearing in *any* case of removal?

## *Compensation and Promotion*

What level or levels of compensation are required to attract competent persons to serve as hearing officers? Should all hearing officers throughout the Government receive the same compensation? If not, should their compensation be of the same level throughout an agency? If not, should it vary within an agency according to (1) subject matter, (2) level of work difficulty, or (3) both.

If you favor more than one level of compensation, how should the process of promotion operate? Who should evaluate for promotion and who should promote?

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## PRESIDENTIAL PREROGATIVE AND STATUTE-LAW

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As is well known, the judgment of the Supreme Court in the now-famous steel seizure case—*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952)—rejected the claim of the government that the President had inherent, or prerogative

power to seize the steel industry, even in the absence of statutory authorization. In several of the concurring opinions, however, there is also discussion of a question of basic importance to students of executive prerogative, namely that of the relationship between such prerogative and statute-law.

That question was presented in the steel seizure case because of the provision by the Congress of a procedure alternative to seizure which the President could have followed to deal with the threat of a steel strike. The Labor-Management Relations Act of 1947, commonly known as the Taft-Hartley Act, includes provisions adopted for the purpose of dealing with nationwide strikes. They establish a procedure whereby the President may appoint a board of inquiry and thereafter, in proper cases, seek injunctive relief from a District Court for an eighty-day period against a threatened work stoppage. The President can invoke that procedure whenever, in his opinion, "a threatened or actual strike . . . affecting an entire industry . . . will, if permitted to occur or to continue, imperil the national health or safety." At the time the Taft-Hartley Act was passed, the Congress specifically rejected a proposal to empower the President to seize any "plant, mine, or facility" in which a threatened work stoppage would, in his judgment, "imperil the public health or security." Instead, the Act directed the President, in the event a strike had not been settled during the eighty-day injunction period, to submit to Congress "a full and comprehensive report . . . together with such recom-

mendations as he may see fit to make for consideration and appropriate action."

As has been indicated, the opinion of the Court (delivered by Justice Black) in the steel seizure case did not see fit to deal directly with the effect of the above Taft-Hartley Act provisions upon the President's prerogative powers. In some of the concurring opinions, there are, however, clear indications that, even if the President had been held to have a common-law prerogative to act as he had, such prerogative power would have been superseded by the statutory procedure. The provisions of the Taft-Hartley Act, said Mr. Justice Burton, "distinguish this emergency from one in which Congress takes no action and outlines no governmental policy. In the case before us, Congress authorized a procedure which the President declined to follow." (659). In such a case, there can be no excuse for Presidential reliance upon prerogative rather than upon the procedure which the Legislature has provided. "I conclude," declared the concurring opinion of Mr. Justice Clark, "that where Congress has laid down specific procedure to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis, . . . I cannot sustain the seizure in question because here . . . Congress had prescribed methods to be followed by the President in meeting the emergency at hand." (662).

The concurring opinions just quoted deal with the question of the relationship between executive prerogative and statute law much as it was dealt with in the leading English case of *Attorney-General v.*

*De Keyser's Royal Hotel*, [1920] A.C. 508. In that case, too, it was held that the Executive could not choose whether it would proceed under its prerogative power or under a statutory procedure enacted to meet the case. The enactment by the Legislature of statutory provisions covering the same ground as the prerogative power must be deemed *pro tanto* to suspend the prerogative. "The Legislature," as Lord Sumner put it, "by appropriate enactment, can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they deal directly with the subject-matter, even though they enact a *modus operandi* for securing the desired result, which is not the same as that of the prerogative." (561). This, it should be noted, was, in the view of the concurring opinions already quoted, precisely what was involved in the steel seizure case. There, too, the relevant Taft-Hartley Act provisions did deal directly with the subject-matter which the President sought to deal with by his asserted prerogative power of seizure, though by a wholly different *modus operandi*.

The approach just outlined helps one to understand the recent decision of Chief Judge Parker in *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), which has attracted a great deal of attention and is now before the Supreme Court. In that case, the court held that an executive agreement between the United States and Canada regulating the importing of potatoes was void where it conflicted with

the provisions of a prior statute dealing with the same matter. "We think," stated the Chief Judge's opinion, "that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. . . . Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy." (659-60).

Here is a needed corrective to what has often seemed the undue prerogative of the Executive in the field of treaty-making. Under Chief Judge Parker's decision, as one commentator puts it, "The nightmare of a headstrong President, ignoring congressional commands and, by a mere dicker with a foreign chief of state, effectively legislating to the contrary for the whole United States, will vanish." *Sutherland*, 67 *Harv. L. Rev.* at 290.

The result in the *Capps* case appears to flow logically from what has already been said with regard to the relationship between prerogative and statute-law. Both the *DeKeyser's Hotel* case in Britain and the concurring opinions in the steel seizure case discussed above stand for the proposition that executive prerogative is subordinate to legislation and must give way in the face of statutory provisions which modify or suspend such prerogative.

It may well be that, since the opinion of

the Court in the steel seizure case held that the President did not have any prerogative power of seizure in the circumstances of the case; what was said in the concurring opinions already referred to was only by way of *obiter*. But *obiter dicta* in the United States Supreme Court, like those in the House of Lords, usually have a "persuasive" force almost equivalent to binding authority. And, in this instance, there appears to be little reason why the *dicta* in question should not be followed by the American Court. The supremacy of the statute in such a case is the only principle consistent with a polity in which all legislative power has been vested in the Legislature. To hold otherwise is to ignore what Lord Atkinson has termed the unanswerable question posed by the Master of the Rolls in the *De Keyser's Hotel* case: "Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and provided by statute for powers previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?" [1920] A.C. at 538.

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### SUBPOENAS AND "THE APA"

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One of the important questions which has arisen concerning the effect of the APA

is that of whether its provisions regarding the enforcement of subpoenas have changed the rule of *Endicott Johnson Corp v. Perkins* 317 U.S. 501 (1943) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). In those two cases, the Court held that the issue of lack of investigatory jurisdiction could not be raised as a defense in a subpoena enforcement proceeding brought by an agency. According to them, the determination of the issue of jurisdiction or coverage is, at least in the first instance, exclusively an administrative question. And the courts cannot refuse to enforce a subpoena because the person to whom it had been issued shows that the agency concerned was without authority over him.

Section 6(c) of the APA provides that "Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law." Does this provision permit the defense of lack of agency jurisdiction to be considered by the court in a subpoena enforcement proceeding? A good argument can be made that it does. For it is basic in our system that the administration may act only within the area of "jurisdiction" marked out for it by law. If a private individual does not come within the coverage of the particular agency's enabling legislation, the agency is without lawful power to take any action which affects him. Hence, it can be claimed in such a case that a subpoena issued by the agency is not "in accordance with law" under section 6(c) of the APA and should not be enforced by the courts.

There are indications that this was the view of the framers of the APA. The "term 'in accordance with law,'" declared the sponsor of the APA in the House of Representatives, "does not mean that a subpoena is valid if issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpoena is directed are within the jurisdiction of the agency which has issued the subpoena." *APA: Legislative History*, 363.

It will, however, be asked why, if, as this clearly indicates, it was the intent of the framers of the APA to do away with the rule of the *Endicott Johnson* and *Oklahoma Press Publishing* cases, they gave effect to their intent only through the weekly worded language of section 6(c). To answer this question adequately, it must be realized that, in November 1945, when section 6(c) was phrased in its present form, only *Endicott Johnson Corp. v. Perkins* had as yet been decided by the Supreme Court. That case involved a government contractor and, if it stood alone, it might well be contended that its principle is limited only to such cases. The government contractor is not treated by our administrative law as one having "rights" which may be adversely affected by agency action. His is a mere "privilege" to contract with the government which the latter may grant on any terms which it wishes. The Walsh-Healey Law, the enabling statute in the *Endicott Johnson* case, said Justice Jackson there, "is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into compe-

tition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." 317 U. S. at 507.

The answer to the question of why section 6(c) of the APA was not worded more clearly in order to alter the rule of the *Endicott Johnson* case is thus that it was not thought necessary at the time section 6(c) was drawn up in its present form. The draftsmen of that section felt that the *Endicott Johnson* rule did not apply outside the government contract field and that there was consequently no need for a provision expressly doing away with it. This feeling is clearly shown in the statement by Representative Walter, on May 24, 1946, in the House debate on the APA, with regard to section 6(c), that "the existing constitutional safeguards . . . in some cases, such as those involving government contractors—see *Endicott Johnson Corp. v. Perkins* . . ., have been held inapplicable."

*APA: Legislative History*, 363.

The difficulty with Representative Walter's statement is that, even at the time it was made, the assumption upon which it was based was no longer valid. For, several months before, on February 11, 1946, the Supreme Court had rejected the notion that the *Endicott Johnson* case represented an exception to the normal rule applicable to subpoena enforcement proceedings. In *Oklahoma Press Publishing Co. v. Walling*, the Court held, on the contrary, that the principle of *Endicott Johnson* is one which is generally applicable in such cases.

The above shows clearly that section 6(c) of the APA, as it was drawn up, was based, in large part, upon an erroneous interpretation of the then-existing law on the enforcement of subpoenas. Although its draftsmen felt that private parties should be allowed to raise the defense of lack of agency jurisdiction in a subpoena enforcement proceeding, they did not include an express provision to the effect because they deemed it unnecessary. And they felt that way because they were apparently unaware of the legal effect of the *Oklahoma Press Publishing* case which was decided several months before the APA was adopted.

That such unawareness by the draftsmen of the APA was unfortunate appears to be an understatement. For it has resulted in section 6(c) being open to an interpretation which is exactly the opposite of that which they intended. It can easily be claimed that that section was designed merely as a restatement of the existing law, exemplified at the time of the enactment of the APA by the *Endicott Johnson* and *Oklahoma Press Publishing* cases. One may doubt whether the weakly-worded provision of section 6(c), under which subpoenas are to be enforced only if found to be in accordance with law, is by itself enough to change the rule of those cases, which has been so firmly ingrained in federal jurisprudence.

The subpoena enforcement cases that have arisen since the enactment of the APA appear to bear out this view. The clearest holding in point is that of the Court of Appeals for the Fifth Circuit in

*D. G. Bland v. National Labor Relations Board*, 177 F.2d 555 (5th Cir. 1949). Appellant there set up as a defense in the subpoena enforcement proceeding that the Board was without jurisdiction to conduct the proceeding in which the subpoena was issued. The court held, however, that such a defense could not be raised under the *Endicott Johnson* and *Oklahoma Press Publishing* cases. Nor, in the view of the court, was the rule of those cases affected by the APA. "In adopting the Administrative Procedure Act . . . , the rule laid down by the Supreme Court in the case of *Endicott Johnson Corporation v. Perkins* . . . was enacted into statutory law." (558).

In reaching its decision, the court in the *Bland* case states that it was influenced primarily by the fact that, as it was originally introduced, section 6(c) of the APA expressly provided that, in a subpoena enforcement proceeding, "the court shall determine . . . the authority or jurisdiction of the agency." The rephrasing of that section in its present form, says the court, "is persuasive that the Congress intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena." (558). See, similarly, *Attorney General's Manual on the APA*, 69.

One wonders whether the legislative background thus relied on by the court is enough by itself to support its holding. That the change in the language of section 6(c) was, on the contrary, devoid of significance in the eyes of the draftsmen of the APA is shown by the reply of the Senate Ju-

diciary Committee to a later suggestion that section 6(c) be changed back so as again expressly to make agency jurisdiction a litigable issue. "Private parties," states the Committee Print of June 1945, "urge that after the word 'be' in the second sentence there be added, 'within the jurisdiction of the agency and otherwise,' so that no administrative subpoena may be enforced beyond the lawful jurisdiction of the agency. It is felt that 'in accordance with law' as now stated . . . means that." *APA: Legislative History*, 28. To rely upon the change in the language of section 6(c) of the APA, without any reference to the view of the Senate Committee just quoted, that such change did not alter the meaning of the section, as did the court in the *Bland* case and the Attorney General before it, is to say the least, to use the legislative history of the Act as anything but an impartial aid in interpreting its provisions.

Yet, even if this be true, it should not be thought that the federal courts will refuse to follow the holding of the *Bland* case. On the contrary, at least one other Court of Appeals has also held that subpoena enforcement proceedings are still governed by the rule of the *Endicott Johnson* and *Oklahoma Press Publishing* cases, *Mines and Metals Corp. v. SEC*, 200 F.2d 317 (9th Cir. 1953); *Hamilton v. NLRB*, 177 F.2d 676 (9th Cir. 1949), and the Court of Appeals for the Fifth Circuit has recently reaffirmed its *Bland* decision. *Tobin v. Banks & Rumbaugh*, 201 F.2d 223 (5th Cir. 1953). As has already been indicated, such a result is justified by the weak wording of section 6(c) of the APA. Largely

because of their apparent awareness of the *Oklahoma Press Publishing* decision, the draftsmen of the APA drew up section 6(c) in terms which could well be construed merely to restate existing law. The result of this is that, despite their probable intent to allow the defense of lack of agency jurisdiction to be raised in subpoena enforcement proceedings, they actually accomplished only a legislative restatement of the rule of the *Endicott Johnson* and *Oklahoma Press Publishing* cases, which is, of course, exactly the opposite of what they appear to have had in mind.

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## FINDINGS AND THE APA

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The rule that agency decisions must be accompanied by the findings upon which they are based is one which has always been fundamental in our administrative law. This is essentially a requirement of reasoned decisions, a requirement which appears clearly to be demanded by man's sense of justice. As it was once expressed by Harold J. Laski, "the giving of decisions without giving the reasons upon which they are based is as near autocracy as you can get."

Under section 8(b) of the APA, agency decisions must include a statement of "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." This, at first glance, appears to go even further than the pre-APA rule requiring findings, for it tends to assimilate the administrative decision to that

normally issued by the federal courts. According to a 1952 district court decision, however, section 8(b) of the APA is, in this respect, merely a restatement of the rule laid down in the pre-existing case-law, notably the leading case of *Florida v. United States*, 282 U. S. 194 (1931). In the case referred to, as in the *Florida* case, an Interstate Commerce Commission order was held invalid because the Commission's report stated ultimate conclusions rather than basic findings. *Atlanta & St. Andrews Bay Ry. Co. v. United States*, 104 F.Supp. 193 (M.D. Ala. 1952).

The trouble with interpreting section 8(b) of the APA as only a re-enactment of the existing law on findings is that the law prior to 1946 on the subject did not prove wholly adequate. It is true that the courts should not, in a modern revival of the spirit of a Baron Parke, insist on findings for their own sake as a formalistic requirement in every case. "We have no desire," as Circuit Judge Goodrich has recently expressed it, "to go over the report of the Board in the fashion of an instructor in English composition advising a high school student." *Baltimore & O. R. Co. v. United States*, 201 F.2d 795, 800 (3d Cir. 1953). At the same time, if the requirement of findings means anything, it must compel administrative agencies adequately to articulate the bases of their action. The findings rule stems from the need for courts to know what it is that an agency has determined in order that they may know what to review. Frankfurter, J., dissenting, in *Yonkers v. United States*, 320 U. S. 685, 694 (1944). If section 8(b) of the APA

was intended to meet this need, it must have been aimed at the pre-APA practice of certain agencies merely to parrot the words of their enabling statute in their findings, a practice which the federal courts have all too often felt powerless to prevent.

That section 8(b) of the APA is not, in fact, being interpreted by the courts so as to render the requirement of findings fully effective is shown by *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952), a case involving the most notorious agency exponent of the pre-APA practice just referred to. The Commission there had instituted a proceeding charging petitioner with unlawfully discriminating in price between customers. A cease and desist order was issued which was not limited to the specific violations proven to have been committed. Instead, the Commission issued a sweeping general order to "cease and desist from discriminating in price: By selling such products of like grade and quality to any purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." This was, in effect, merely to parrot the language of the relevant statute and, accompanied as it was by no opinion and "only the most cryptic reasons in its findings" (Jackson, J., dissenting, *id.* at 481), the FTC order was certainly far from the well-rounded, reasoned decision that Anglo-Americans have come to desire from those exercising adjudicatory authority.

Most students of federal administrative law know that the skeleton-type order involved in this case is typical of those is-

sued by the FTC both before and since the APA. This is true despite the constant criticisms which have been directed against the Commission's practice in this respect. It is unfortunate that in a case like the instant one the majority of the Court did not see fit to pronounce any strictures against the vagueness of the Commission's order. Mr. Justice Clark contented himself merely with the statement that the scope of its order was for the FTC to determine.

To Mr. Justice Jackson who dissented the question of specificity of the administrative order was the key issue in the case. In his view the function of an agency like the FTC is the development and refinement of policies which Congress can indicate only in a general way. This purpose is frustrated if the agency's regulations and orders are no clearer than the statute itself. "Admitting that the Statute is 'vague and general in its wording,' it does not follow that a cease and desist order implementing it should be." (481). As illustrative as anything of the limited practical effect of section 8(b) of the APA in such a case is the fact that neither the majority or dissenting opinion in the *Ruberooid* case saw fit even to mention the requirements of that section.

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### OTHER APA CASES

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*Applicability.*—In *Spiegel v. United States*, 116 F. Supp. 67 (D.C. 1951) in an opinion which has just been published, it was held that the APA does not apply to proceedings of the Postmaster General in fixing parcel post rates.

*Right to be heard.*—An interesting decision in the Third Circuit is *Marine Engineers' Beneficial Ass'n v. NLRB*, 202 F. 2d 546 (3d Cir. 1953). The court there held that where a labor union, which had made a charge to the NLRB that another union was guilty of an unfair labor practice, protested against the entry of a so-called "consent order" by the Board, the Board and the charged union could not effectively arrange a settlement without giving the charging union a hearing on its objections thereto. And, according to the court, this is so because of the requirement in section 5(b) of the APA that, where the parties are unable to determine a controversy by consent, hearing and decision upon notice shall be afforded. The difficulty in the case, Judge Goodrich states, comes because in changing times and the evolution of administrative procedure our old analogies are not in point. The charging party in a labor case is something like a complaining witness in a criminal case. But he is certainly much more than that, for a complaining witness is certainly not entitled to appeal even where an appeal is allowed for the prosecution in a criminal case. On the other hand, the charging party is not like the ordinary plaintiff in a lawsuit, who does not have to have anybody's permission to go ahead with his action if he can pay the required fees. This is something in between.

The charging party, after complaint is issued, does have some standing. The Board may, the court asserts, refuse to do anything about his complaint as already indicated. But once it does, and once it

goes to the extent of filing a complaint, then he is entitled to have a chance to be heard as the APA requires. He has a right to object if after hearing he does not like the result. But he certainly has nothing on which to base his objections unless there is a hearing and a record is made so that the court has something to go on. In other words charging parties are entitled to a hearing to present whatever facts they can find to support their position. And if they believe the Board to be wrong after it makes an order, they can get court review.

*Regulation of Practice.*—*Herman v. Dulles*, 205 F. 2d 715 (D.C. Cir. 1953), affirmed the International Claims Commission's revocation of petitioner's right to appear before the Commission as an attorney because of his violation of certain of the canons of ethics of the American Bar Association. According to the court, the APA leaves untouched the federal rule that an agency having general authority to prescribe its rules of practice may set standards for determining who may practice before it. The APA does not regulate the qualifications of counsel or provide how agencies may regulate them. During debate on the bill Senator McCarran read with approval the Attorney General's statement that section 6(a) "does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar." Bills to regulate admissions and disciplinary proceedings in administrative agencies have been introduced but not passed. It is clear that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act.

*Evidence.*—An NLRB finding based solely on hearsay was set aside in *NLRB v. Amalgamated Meat Cutters*, 202 F. 2d 671 (9th Cir. 1953). The case is of great significance, for it lends support to the view that, since the enactment of the APA, federal courts are bound by the so-called "legal residuum" rule, i.e., that an agency finding cannot be based solely upon incompetent evidence, but that there must instead be in the record at least a residuum of legal evidence supporting it. It is true that the NLRB is not in the same position as other agencies because of the provision in the Taft-Hartley Act that its proceedings follow the rules of evidence in the district courts. But the instant decision does not rest solely upon this provision. Wholly apart from it, says Judge Pope, in proceedings conforming to the requirements of the APA, agency findings cannot be based upon hearsay alone.

*Reviewable action.*—In *United Gas Pipe Line Co. v. FPC*, 203 F. 2d 78 (5th Cir. 1953), the court held that an order of the Federal Power Commission dismissing a petition for a declaratory order sought under section 5(d) of the APA did not constitute reviewable agency action. According to the court, "petitioner has not been aggrieved by the Commission's dismissal of its application for such order without a hearing, and its rights and remedies, if any, remain the same as when the application was filed, entirely unaffected by the recitations preceding or the order of dismissal." (79). One wonders whether this is not an unduly narrow judicial approach to the question of availability of review. It cannot be denied that the Commission's order

did not affirmatively impose any obligations upon the private party. But it has been recognized ever since the famous *Rochester Telephone* case, 307 U.S. 125 (1939), that the mere fact that administrative action does not affirmatively compel or forbid conduct on the part of the person seeking review is not of itself conclusive upon the question of reviewability. It should be noted that, under section 2(g) of the APA, "agency action" includes not only the taking of affirmative action with regard to an agency rule, order, license, sanction, or relief, but also the "denial thereof, or failure to act." Agency action subject to review under the APA thus clearly includes agency inaction of the type involved in the instant case. It is true that the granting of declaratory relief in a case of this type is, under section 5(d) of the APA, vested in the discretion of the agency. This factor is, however, one which affects the question of the scope, not that of the availability, of review. The existence of discretionary power should not be held to preclude review, but only to limit its scope to the issue of abuse of discretion.

*Standing.*—One of the most frequently criticized of Supreme Court administrative-law doctrines is that enunciated in *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938). In that case, the Court held that the fact that a person was a competitor of a party receiving a grant from the Government did not give him standing to challenge the legality of such grant. According to a recent decision by Judge Holtzoff, the APA "enlarged the class of persons who were given standing to invoke the judicial proc-

ess. The doctrine of *Alabama Power Co. v. Ickes* . . . is not applicable to proceedings under the Administrative Procedure Act." *American President Lines v. Federal Maritime Board*, 112 F.Supp. 346, 349 (D.C. 1953). And the learned judge proceeded to hold that a shipping line had standing to seek review of the grant of a subsidy by the Federal Maritime Board to two competing lines.

Whether literally compelled by section 10(a) of the APA or not, Judge Holtzoff's decision on the standing issue appears sound. The federal case-law on the subject has, for many years, recognized that the economic interest of a competitor is normally sufficient to allow him to bring a review action. And, in its decision in the well-known *Sanders* case, 309 U.S. 470 (1940), the Supreme Court extended the concept of direct economic injury to petitioner to include the grant of a license to a rival in a closely competitive field. If that is true of petitioner in the *Sanders* case, why is it not just as true of the shipping line whose competitor receives an FMB subsidy? The shipping line's interest in freedom from governmental aid to its competitors is as deserving of protection as *Sanders'* interest in freedom from competition by a rival licensee. In addition, in a case of this type, unless the shipping line is permitted to challenge the administrative action, it is most unlikely that the legality of such action will ever be reviewed. In view of the judicial role in our system in enforcing the principle of administrative legality, it is of the utmost importance that agency action should not be placed in the position of practical conclusiveness

which it is by the doctrine of *Alabama Power Co. v. Ickes*.

Even if one agrees with Judge Holtzoff in his refusal to follow the *Alabama Power* case, that does not mean that all governmental action which may possibly benefit particular economic interests is subject to review at the suit of their competitors. It is only when there is clearly an adverse effect upon such competitors' positions, as by the license granted in the *Sanders* case or the subsidy accorded to the shipping lines in the recent decision by Judge Holtzoff, that the governmental action should be reviewable. Thus, in *Atlantic Freight Lines, Inc. v. Summerfield*, 204 F.2d 64 (D.C. Cir. 1953), a motor carrier competing with the Baltimore & Ohio Railroad sought to enjoin the Postmaster General from issuing a postage stamp in commemoration of the 125th anniversary of the Railroads incorporation. There was no standing to sue here, the court held. The possible free "advertising" of plaintiff's competitor does not appear to involve a direct enough injury to plaintiff for it to seek review.

*Scope of review.*—A 1952 decision by the Court of Appeals for the Fourth Circuit contains an interesting discussion of the difference between review of a lower court sitting without a jury and review of an administrative order. The basic difference, reads the opinion of Chief Judge Parker, is that in the former case appellate courts are given power to review the facts, whereas, in the latter, their power is limited to setting aside the findings of the agency if not supported by substantial evidence. In the one case they review the facts, in

the other the sufficiency of the evidence to sustain the agency's findings. If Congress had intended to give a power of review similar to that on appeals in equity, it knew perfectly well how to do so, as shown by the provision for review of Tax Court decisions. The proposition was fully considered and was rejected because the effect of its adoption would have been to destroy the unified administration attained by the creation of a single agency and to make of the eleven courts of appeals eleven super agencies. *NLRB v. Southland Mfg. Co.*, 201 F.2d 244 (4th Cir. 1952).

Nor, according to Judge Parker, does the provision in the Administrative Procedure Act that review is to be of the "whole record" provide for review of the facts as in equity or anything analogous to such review. There is no real difference, says he, between the function of the court as outlined in the APA and its function under the rule that a verdict should not be allowed to stand against a motion for judgment n. o. v. unless supported by evidence which a reasonable mind might accept as adequate to support a conclusion, or the rule that a verdict should be directed where the evidence is all one way or so nearly one way that reasonable men could not doubt what the facts are. In either case, the duty is not one of finding the facts but of appraising the evidence and of determining whether it furnishes a substantial basis for the finding of fact sought to be predicated thereon.

A different view is taken by Judge Soper, who delivered a concurring opinion. According to him, under the APA, review of

an agency is now analogous to review of a lower court in a non-jury case. It is difficult, he asserts, to draw the line between the function of an appellate court in passing upon the decision of a trial judge sitting without a jury in an action at law or in a suit in equity, on the one hand, and the function of the court in reviewing the decision of an administrative tribunal on the other. The decision of a trial court must be sustained in any case unless it is clearly erroneous, and its greater opportunity to learn the truth based upon its more intimate contact with the case must be respected. In like manner the conclusions of the administrative body and its expertness may not be lightly set aside; but they too may not be given effect if they are so erroneous or so unjust as to shock the conscience of the court. The mental processes of the reviewing authority which are called into action in each situation are so similar that they can hardly be distinguished.

The difference of view between Judges Parker and Soper is of great significance, for the view that prevails will largely determine the extent to which review has been broadened under the APA. If Judge Soper is correct, then review has, indeed, been widened by the 1946 Act. And, from the point of view of the logical systematization of the law, it would seem to be desirable for review of agencies to be assimilated to review of lower courts. If the ultimate development of our administrative law is to be the judicialization of our administrative agencies, much as the executive tribunals of pre-Commonwealth Eng-

land were judicialized and fitted into their place in the existing legal order, then the approach asserted by Judge Soper is a necessary step in the judicialization process. It should be noted that the problem dealt with by the Fourth Circuit in the case under discussion is in no way resolved by the now-famous *Universal Camera* case, 340 U.S. 474 (1951). It held only that review under the APA was to be somewhat broader than it had heretofore been. But it did not tell us how much broader review was to be. That has been left for the lower federal courts to work out.

That review under the APA and Taft-Hartley Acts is still anything but a trial *de novo* is shown by *NLRB v. Poultry Enterprises*, 207 F. 2d 522 (5th Cir. 1953). Respondent there, resisting enforcement, made a head-on attack upon the findings of examiner and Board, as contrary to the truth and right of the case as made upon the record as a whole. Pointing to the fact that the testimony of the few witnesses credited by examiner and Board was flatly contradicted by the testimony of witnesses in the ratio of nearly four to one, respondent insisted that under teachings and upon the authority of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), it was the duty of the court to refuse enforcement of the Board's order because unsupported on the record as a whole.

The court, however, did not think so. "In *NLRB v. Robbins Tire & Rubber Co.*, 5 Cir., 161 F. 2d 798, 800, where the proportion of the witnesses against, to those for, the examiner's conclusions was far greater than it is here, we held exactly

to the contrary of this contention. We, therefore, reject that contention, that we can and should in effect review the record *de novo*, determining for ourselves the credibility of the witnesses and the preponderance therefore of the credible testimony." (524).

In *NLRB v. Falls City Creamery Co.*, 207 F. 2d 820 (8th Cir. 1953), the court goes more fully into the question of the extent to which it will now weigh the evidence in reviewing NLRB orders. The court admits that it must not weigh the evidence and substitute its judgment for the Board's as to which of conflicting evidence is entitled to the greater weight, if its judgment in that regard should differ from the Board's. But its opinion goes on, "when we say we must not weigh the evidence, the term weigh is used in its legal sense, connoting a determination of which evidence carries the greater conviction. That, under the law, is the function of the Board. But when we discharge our responsibility of determining whether a factual conclusion is supported by substantial evidence on the record considered as a whole, we must actually weigh the evidence. But then it is 'weighed' in another sense entirely; not to determine whether the evidence supporting the Board's finding is more convincing or of greater weight than evidence to the contrary, but for the purpose of comparing both and determining whether by comparison the evidence followed by the Board is substantial when compared with all the evidence in the record on the subject. Thus it results that when all of the evidence on the issue in question is meager—when, for ex-

ample, the only evidence of the motive of discharge of employees is union activity, slight evidence of union antipathy by the employer, and coincidental discharge, the evidence supporting the conclusion that the discharge was on account of union activity may be 'substantial'. And in other cases where that same evidence is present but with it in the record is a mass of evidence so preponderant that by comparison the meager facts, 'substantial' standing comparatively alone, shrink to such a comparative insignificance that they cannot be said to be substantial in the light of the entire record a finding based upon them has not been permitted to stand." (825).

Still another case dealing with the effect of the APA and Taft-Hartley Acts upon the scope of review of NLRB orders is *NLRB v. San Diego Gas & Electric Co.*, 205 F. 2d 471 (9th Cir. 1953). According to the court there, under those Acts, appellate courts are now required to take a "new look" in determining whether substantial evidence exists to support a finding. It is no longer sufficient if some substantial evidence exists. Such evidence must withstand scrutiny with an eye focused on its relation to all the evidence in the record. Of course this does not imply that courts are now to judge the credibility of witnesses. That function still remains with the trier of the facts. "In the instant case, as in most contested cases, we are called upon to consider conflicts in the testimony given by opposing witnesses. Even though we would have, had we been the trier of the facts, resolved the conflict differently, we cannot do so as a reviewing court. The testimony supporting the peti-

tioner's orders is not inherently improbable nor is the evidence produced by respondent so over-whelming as to render the testimony on which petitioner relies untrustworthy. Reviewing the whole record we are not left with a conviction that a mistake has been made." (475).

Compare *NLRB v. Stafford*, 206 F. 2d 19 (8th Cir. 1953); *NLRB v. Nina Dye Works*, 203 F. 2d 849 (3d Cir. 1953); *NLRB v. Brown & Root, Inc.*, 203 F. 2d 139 (8th Cir. 1953).

An interesting case which bears upon the problem of the scope of review of NLRB orders is *NLRB v. National Die Casting Co.*, 207 F. 2d 344 (7th Cir. 1953). The hearing there was conducted by an examiner who died before he had prepared his report. A successor examiner then considered the evidence that had been taken and recommended the order which the Board entered. In such a case, the court held it would review the facts more fully than in the normal case. It is obvious that inasmuch as neither the reporting examiner nor the Board saw or heard the witnesses testify, and the evidence taken by the deceased examiner came before the successor examiner after it had been transcribed, the usual advantages enjoyed by the trier of the facts in seeing and hearing the witnesses and in determining the credibility which should be extended to them are not present here. Consequently, said the court, it found it necessary to scrutinize the evidence closely.

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## OTHER FEDERAL CASES

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*Delegation of subpoena power.*—The question of whether an NLRB subpoena was invalid because issued by a member of the Board to whom the power of issuance had been delegated was considered in *Jackson Packing Co. v. NLRB*, 204 F.2d 842 (5th Cir. 1953). According to the court, such question must be answered in the negative. Nor, says it, is its answer contrary to the decision of the Supreme Court in *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942). It should be noted that the court's holding on the relevancy of the *Cudahy* case appears sound. *Cudahy* involved delegation of the subpoena power by the agency head (the Wage and Hour administrator) to a regional director. Here, the delegation was by a multi-headed agency to one of its members. Hence, the interdiction against delegation of *Cudahy* does not have the same reasons for being applied.

*Quaere:* Whether the *Cudahy* holding itself is still good law as a general principle of our administrative law in view of *Fleming v. Mohawk Co.*, 331 U. S. 111 (1947).

*Procedural rules.*—A decision in the Eighth Circuit holds that the NLRB could properly entertain an application for review of an order of a regional director, even though the application was made six days after the time fixed by the rules of the Board for filing such application. No claim was made and no proof was offered to show any prejudice suffered as a result

of the granting of the extension of time. The argument that the Board was powerless in the public interest to relax the time provisions of its procedural rules in any case before it was asserted to be not worthy of serious consideration. It is always within the discretion of a court or an administrative agency, said the court, to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party. The rule stated applies with especial force in cases before the NLRB. The Board acts in the public interest and not in vindication of private rights. Its discretion is not to be controlled at the whim of a private party to the neglect of the public interest.

*Pleadings.*—According to Chief Judge Parker, it is an abuse of discretion in an administrative agency to refuse an amendment when it can cause no delay, can hurt no one, is in furtherance of justice and is necessary to prevent irreparable loss to one of the parties. *Atlantic Seaboard Corp. v. FPC*, 201 F. 2d 568 (4th Cir. 1953).

And in *Dart Transit Co. v. ICC*, 110 F. Supp. 876 (D. Minn. 1953), it was held that it was not enough to invalidate an ICC hearing that the notice given to a litigant, who was already aware of the issues to be tried, did not contain a complete and precise bill of particulars.

*Parties.*—The elementary principle that one not a party to an administrative proceeding cannot seek review of agency ac-

tion was applied in *Wallach v. SEC*, 206 F.2d 486 (D. C. Cir. 1953). The enabling statute, said the court, expressly requires that a petitioner seeking review of an SEC order be a party to the proceeding before the Commission of which review is sought. Since this petitioner declined to become a party before the Commission he cannot now invoke the reviewing jurisdiction of the court.

A variant of the problem of parties in administrative proceedings was presented in *Wallach v. SEC*, 202 F.2d 462 (D. C. Cir. 1953), for at issue there was, not the right of a private individual to be made a party, but the power of the agency to compel private persons to become parties against their will in disciplinary proceedings involving other persons. The court held that an SEC procedure, compelling alleged violators of the Act who were controlled by broker-dealers registered under the Act (such as salesmen of the latter) to become parties to proceedings brought against their principals by the Commission, was invalid. The Act contemplates that the revocation procedure shall apply only to registrants or applicants and the Commission consequently exceeded its statutory authority in compelling others to become parties. The Commission, said the court, may be able to convince Congress that the improvised administrative procedure is preferable to the judicial procedure now provided by the Act. But until it does, the statutory provisions lead to no such absurd result as would warrant the Commission's superimposing its judgment upon that of Congress.

*Cross-examination.*—An interesting case involving unjustifiable restrictions on the cross-examination of key witnesses so as to deprive the petitioner of a fair hearing is *Carter Products v. FTC*, 201 F.2d 446 (9th Cir. 1953). As expressed by the court there, especially in the case of expert witnesses, cross-examination is of necessity exploratory and should be given broad latitude. Neither counsel nor the judge can know in advance what chinks may be disclosed in the armor of the expert or what frailties revealed in his premises. The condition imposed by the examiner that petitioner make this adversary witness his own was flagrant error.

*Res judicata.*—The question of the *res judicata* effect of a cease and desist order of the Civil Aeronautics Board was at issue in *American Air Transport v. CAB*, 206 F.2d 423 (D. C. Cir. 1953). The Board there had ordered petitioner to cease and desist from regular air transportation in violation of a part of the Board's Economic Regulations authorizing irregular carriers to provide only infrequent services in a non-uniform pattern of operations. Such order, under the enabling statute, was not enforceable except by court order. No enforcement proceeding was brought by the Board and no review proceeding was brought by petitioner. More than two years later, the Board revoked petitioner's license, partly upon the ground that petitioner had failed to comply with the cease and desist order. The question for the court was whether the validity of the cease and desist order was open to challenge in the revocation proceeding. The court held that it was not, asserting that it could not

now go behind that order. Petitioner was bound by its failure to invoke judicial review under the provisions of the relevant Act when the order was first issued. Though there may be circumstances under which the application of the doctrine of *res judicata* to administrative determinations may be relaxed, here no such circumstances have been shown.

That the problem involved in the instant case may not be as simple as the court depicts it is shown in the concurring opinion of Judge Prettyman. "If a cease and desist order," says he "not reviewed by a court of appeals, is *res judicata* of all matters involved in it, and if the Board can base revocation of a license upon disobedience of that order the Board has a potent weapon for enforcement; potent enough, one would think, to remove court enforcement proceedings from the realm of usefulness. But Congress must have meant court enforcement proceedings to be used. On the other hand, it would seem odd that a company could ignore an order of the Board in the face of a statutory direction to obey and in the presence of a right to court review if the order was thought invalid."

With the above case should be compared *Niagara Mohawk Power Corp v. FPC*, 202 F.2d 190 (D. C. Cir. 1952) where the same court categorically asserted that *res judicata* does not ordinarily apply to decisions of administrative tribunals.

*Exhaustion of administrative remedies.*—*Bruce v. Stilwell*, 206 F.2d 554 (5th Cir. 1953), arose out of an action for a declaratory judgment and injunctive relief brought

by Negro students seeking admission to a Texas junior college to which they had been refused admission because of their race. Defendants contended that the complaint should be dismissed because plaintiffs had failed to exhaust administrative remedies provided by Texas law, namely, that of appeal to higher school authorities. The court was not convinced that there was available such appeals in these circumstances. But it went on to assert that even if such administrative remedies were available, they need not be resorted to here. When the Board of Trustees of the college acts without authority of law in such a manner as to deny to colored students the advantages accorded to others in like situation and this is established, as here, by admitted facts, the injured persons' right of access to the courts is absolute and complete, and they need not seek to exhaust further administrative remedies. In this case, the question at issue is one of law for the court since the allegations of the complaint as to discrimination must be taken as true on the motion to dismiss. And, under Texas law, it is established that in cases involving pure questions of law, as contradistinguished from questions of fact, immediate resort to the courts is proper.

There appears to be little doubt but that the reasoning of the court here is contrary to the settled federal rule in exhaustion of administrative remedies cases, for, under *Myers v. Bethlehem Shipbuilding Co.*, 303 U. S. 41 (1938), the exhaustion rule must be followed even where it is claimed that the agency concerned is proceeding without jurisdiction. The instant case does not,

however, involve a rejection by the court of the *Myers* rule, since the question involved is, according to the court, only one of Texas law, and the federal rule is hence inapplicable.

The strictness with which the exhaustion rule is normally followed in the federal courts is shown by a case like *Morgan v. United States*, 107 F. Supp. 501 (W. D. Ky. 1952). The court there held that where a statute provides for an administrative remedy a party is not entitled to injunctive relief for supposed or threatened injury until the prescribed administrative remedy has been exhausted, even though plaintiffs' constitutional rights are alleged to have been violated. See, similarly, *Haymes v. Landon*, 115 F. Supp. 506 (S. D. Cal. 1953).

*Administrative finality.*—The non-reviewability of action of the Administrator of Veterans' Affairs denying a pension claim is reaffirmed in *Hahn v. Gray*, 203 F.2d 625 (D. C. Cir. 1953). In the case of this agency, there is a statutory provision for administrative finality as strong as any in our law. It provides that no court shall have jurisdiction to review a decision like that challenged here. The purpose of this provision, whose language approaches that of the notorious British "conclusive evidence" clause (the most extreme provision for administrative finality in the common-law world), is, in the words of the court, to remove the possibility of judicial relief even if the action of the Administrator was arbitrary and capricious. Appellant here sought to draw a distinction between a claim for benefits or payments—which was admittedly not reviewable—and this case, where, according to appellant, the Adminis-

trator was seeking to deny the "very living existence" of the claimant. The court found no merit in this argument. The Administrator, reads its opinion, was concerned with the existence or non-existence of this claimant only in so far as she presented a claim for benefits or payments, and, as a matter of fact, it is precisely from a denial of her claim for a benefit that this action was initiated. Since Congress withdrew from the jurisdiction of the courts every final decision in relation to benefit payments, and since there can be no doubt as to its power so to do, because such benefits are mere gratuities, the District Court lacked jurisdiction to entertain this action.

Compare *United States v. Gibson*, 207 F. 2d 61 (9th Cir. 1953) (decision by Veterans' Administrator that Veterans' Administration had paid certain sum to veteran by mistake held not within above discussed provision for administrative finality, and court could review his decision).

*Reviewable action.*—In *American Federation of Labor v. NLRB*, 308 U. S. 401 (1938), the Court held that a certification order of the Labor Board could not be reviewed directly by a court of appeals under the review provisions of the National Labor Relations Act. But it left open the question of whether a district court under its general equity powers and in the exercise of its jurisdiction over actions arising under acts of Congress regulating commerce had jurisdiction to review in an independent proceeding action of the Board certifying a bargaining agent, determining an appropriate bargaining unit, or ordering an election, and to afford injunctive or other re-

lief from such Board action. In *New Bedford Loomfixers' Union v. Alpert*, 110 F. Supp. 723 (D. Mass. 1953), the court refused to entertain such an independent action to review the Board's refusal to designate the craft represented by plaintiff union as the appropriate collective bargaining unit. It should be noted, however, that the court does not go nearly so far as to answer the question left open in the *American Federation of Labor* case with an unqualified negative. Instead, Judge Ford implies that the court may have jurisdiction where a showing is made that the Board has acted unlawfully either by way of departure from statutory standards or in violation of due process. In his implication here, Judge Ford appears to be going farther than other cases which have considered the matter. They hold that the question of whether a district court can review action of the NLRB in certification proceedings must be answered with a categorical negative. See e.g., *Millis v. Inland Empire District Council*, 144 F.2d 539 (D. C. Cir. 1944). Nor, under those cases, is the answer at all affected by section 10 of the APA. See, eg., *Mechanics Educational Foundry v. Douds*, 103 F. Supp. 130 (E. D. Pa. 1952).

*Anthony v. NLRB*, 204 F.2d 832 (6th Cir. 1953), involved a proceeding by employees and union members for review of an alleged "final order" of the Board. This alleged final order was the result of an unfair labor practice charge made by the union against petitioners' employer. The petition averred that, after the union had filed its charge, a settlement agreement was negotiated between the union representa-

tive and the employer and approved by the NLRB. Petitioners asserted that the settlement agreement constituted a "final order" of the Board subject to review under section 10 (f) of the Labor Act. The court held, however, that the settlement agreement was not a "final order" of the Board. Since the agreement in question was entered into by the parties before a complaint was issued, there was no formal action by the NLRB of such nature as to constitute a final order.

Compare *Hourihan v. NLRB*, 201 F.2d 187 (D.C. Cir. 1952), reaffirming the established rule that issuance of a complaint is within the discretion of the General Counsel of the Board and that action in the matter cannot be compelled by mandamus;

*United Gas Pipe Line Co. v. FPC*, 206 F.2d 842 (3d Cir. 1953) (FPC order directing gas distributing company to go forward with presentation of its evidence in a rate investigation proceeding not sufficiently final and definite to be reviewable.)

*Standing*.—At least two important federal decisions were rendered during 1953 on the question of the standing necessary to maintain a review action. In *Doehla Greeting Cards v. Summerfield*, 116 F. Supp. 68 (D. C. 1953), it was held that users of the parcel post service had standing to maintain an action to enjoin enforcement of increased parcel post rates. The court held that, under plaintiffs' allegation that the arbitrary and capricious fixing of excessive parcel post zone rates would effectively exclude the plaintiffs from the benefits of the

postal service, there was the same type of invasion of legally protected rights as was recognized in the well-known case of *Columbia Broadcasting System v. United States*, 316 U. S. 407 (1942). Though it has not been held as yet that citizens have a constitutional right to reasonable mail rates, the courts have stated that grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. The fixing of arbitrary and discriminatory postal rates without any rational basis and so excessive as to effect an exclusion from the benefits of postal service, would, in the court's view, constitute action outside the authority of the Postmaster General in violation of the plaintiffs' rights under the due process clause of the Constitution. Hence its conclusion that plaintiffs have standing to have the Postmaster General's action reviewed.

An even more important decision on the question of standing was rendered by the Court of Appeals for the Second Circuit in *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953). In the November, 1953, issue of this Bulletin, it was pointed out (at p. 26) that the recent decision of the Supreme Court in *Chapman v. FPC*, 345 U. S. 153 (1953), appears to foreshadow a liberalization of that tribunal's harsh doctrine on the standing of consumers. That such liberalization is desirable is clear if one considers the merits of the Supreme Court's jurisprudence on consumer standing. Despite the Court's reluctance in the past to find such standing, it is difficult to see why a con-

sumer does not have a direct personal interest in administrative action which affects the product or service which he purchases. If the price which he has to pay is increased by administrative order, is it not to deal in abstract legal learning rather than the realities of the record to hold that he does not have a personal interest in having the order in question reviewed?

Ever since *FCC v. Sanders Radio Station*, 309 U.S. 470 (1940), federal case-law has recognized that the economic interest of a competitor is sufficient to allow him to bring a review action. If that is true of a competitor, why is it not also true of a consumer whose economic well-being may also be wholly dependent upon the service which he uses, especially in the field of public utilities?

The answer which the Supreme Court has sometimes given (See, e.g., *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 592 (1926)), that in cases of this type there are only two parties involved, the administrative agency and the company which is being regulated, simply does not square with the facts. It rests upon the proposition that the consuming public is adequately represented by the administration, which can be wholly relied upon to defend the public interest—a proposition which may often be, at best, a pious fiction in these cases.

In controversies of the type under discussion, unless a consumer is permitted to challenge the administrative action, it is unlikely that the legality of such action will ever be reviewed. In a practical sense, then, such action would be conclusive, for

it would never be challenged by the only parties involved, the agency and the company regulated by it. If the administrative action is beneficial to the company—such as an order raising the price of its product or services—it is only the consumer who is adversely affected and who will seek to challenge its validity.

In view of the role of the courts in enforcing the principle of administrative legality, it is of the utmost importance that agency action should not be treated as conclusive. In these cases review should be made available at the suit of the consumer, the one party who may have an interest in challenging the administrative action.

The proper approach in cases of this kind is that followed by the Court of Appeals for the Second Circuit in the *Reade* case, *supra*. The court there held that petitioner's interest as a consumer sufficed to give him standing to challenge an order of the Federal Security Administrator regulating the vitamin content of oleomargarine. The asserted consumer interest, said Judge Frank, constitutes petitioner a person adversely affected. If Congress authorized the Attorney General to bring suit to restrain a federal officer from exceeding his statutory authority, such a suit would be a "case or controversy" satisfying the constitutional provision. Congress, by authorizing certain persons within a described class—here those "adversely affected"—to bring actions to restrain such officers from transcending their statutory authority, validly creates a class of "private Attorney Generals" to vindicate the right of the United States against its wrongdoing officer.

It is recognized that this approach of Judge Frank may be contrary to that of the Supreme Court in consumer-standing cases. As one commentator has, however, expressed it, in discussing the earlier similar opinion of Judge Frank in *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), this decision may well be an instance of the rare phenomenon of a lower court's decision superseding a recent Supreme Court decision. *Davis, Administrative Law*, 705. On the merits, Judge Frank's approach certainly appears to be the sound one. In administrative-law cases the individuals bringing review actions are not merely in the position of ordinary parties plaintiff. They are also, to use Judge Frank's apt characterization, "private Attorney Generals." If the action to review is entrusted to private individuals, it is to transform them into overseers of the Administration; they doubtless have a personal interest, but at the same time they act in the public interest; in this type of case, they are not merely parties defending their own right: their position approaches that of a district attorney pursuing the prosecution of a crime.

*Review of questions of law.*—In *American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S. D. N. Y. 1953), the court set aside an FCC order adopting certain interpretative rules in relation to radio and television "give-away" programs. The court held that such programs were not lotteries and that the Commission could not interpret the statute prohibiting the broadcasting of lottery information so as to prohibit such programs. According to Judge Liebell, the question at issue was one of law,

and hence a judicial, rather than an administrative, question.

"These rules," said he, "do not involve any of the scientific or technical problems of radio or television, or their statistical field and inter-station relationships, concerning which the Commission has expert knowledge. The Commission's opinion, although entitled to respect, is not authoritative. . . . We need not consider as applicable the admonition of Judge Frankfurter in *National Broadcasting Co. v. United States*, 319 U. S. 190 at page 218, . . . that the courts should hesitate to substitute their own views for those of the Commission in matters peculiarly within the knowledge and experience of the Commission. The basic question presented on these motions is the interpretation of the lottery statute, §1304, and its application to the types of programs condemned by the Commission's Rules. That is a legal question and peculiarly within the province of the courts."

*Review of jurisdiction.*—In *NLRB v. Pappas & Co.*, 203 F.2d 569 (9th Cir. 1953), the court held that, under the provision of the National Labor Relations Act that no objection not urged before the Board shall be considered by the court, an employer which had appeared on a charge of unfair labor practices without counsel and without asserting any defense was not entitled to assert for the first time before the court in an enforcement proceeding that its employees were agricultural laborers and hence outside the Act. Nor did the fact that the employer's defense was a jurisdictional one make any difference. No de-

fense other than jurisdiction of the subject matter which was not made to the Board can be raised at the hearing on petition for enforcement of the Board's order. It is clear, says the court, that the general subject matter of the instant case, to-wit, a labor-relations controversy, was within the Board's jurisdiction. Having such jurisdiction, it follows that the Board had for decision the matter of determining whether the facts brought the case within the orbit of the Act upon which the case was based. The first kind of jurisdiction can be questioned at any time, but a finding as to the second kind of jurisdiction, being subject to evidence as to whether the facts of the case are within the reach of the applicable statute, stands upon the same basis as any other finding of fact. It cannot be collaterally attacked. And it can be reviewed only as any other finding of fact in the case can be reviewed.

One wonders, however, whether the court is justified in distinguishing, as it does, between the two kinds of jurisdictional questions. As the Supreme Court once put it, in an enforcement proceeding of this type, "Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce." *NLRB v. Cheney Lumber Co.*, 327 U.S. 385, 388 (1946). Certainly this implies that all claims of lack of jurisdiction can be raised in the enforcement proceeding.

That review of agency jurisdiction is always available is the view of Judge Frank, concurring in *Schwartz v. Strauss*,

206 F. 2d 767 (2d Cir. 1953), a case involving review of the action of a selective service board. "The facts here are undisputed," reads Judge Frank's opinion. "But the position taken by defendant's counsel is that, even if the undisputed facts show unmistakably that the Board violated the statute, i. e., plainly exceeded its powers, nevertheless no court would have jurisdiction to enjoin plaintiff's induction. Thus if admittedly plaintiff were (1) a member of Congress, or (2) a naval officer on active duty, yet (so the argument runs) he could not in court attack the patently invalid action of the Board except either (a) by reporting for induction and then seeking habeas corpus or (b) by refusing to comply and setting up the invalidity when he was prosecuted criminally. I gravely doubt the soundness of that contention, i. e., in a case where, on undisputed facts, the Board's lack of jurisdiction is manifest." (767).

*Jurisdictional fact.*—*O'Leary v. Dielschneider*, 204 F. 2d 810 (9th Cir. 1953), involved a proceeding to review an award made under the Longshoremen's and Harbor Workers' Compensation Act. The district court had granted a trial *de novo* on the question of whether the employee's death had actually occurred. The Court of Appeals held that the granting of a trial *de novo* was error. The *de novo* procedure here followed, said the court, if supportable at all, is supportable only on the assumption that the doctrine of *Crowell v. Benson*, 285 U.S. 22 (1932), retains vitality. After expressing skepticism as to the continued authority of that doctrine, the court went on to say that its present

validity need not be decided here. The fact in question was not a jurisdictional one within the *Crowell v. Benson* doctrine, and hence the trial court was in error,

*Record on review.*—In *United States ex rel. Acardi v. Shaughnessy*, 206 F. 2d 897 (2d Cir. 1953), a deportation case, relator alleged that the Board of Immigration Appeals and Attorney General had not acted in a truly judicial manner because his case had been prejudged by his prior inclusion by the Attorney General in a list of undesirable aliens. The court held that, since there was nothing in the record to disclose any such irregularity, the allegation could not be upheld. The reviewing court could not go behind the administrative record in a case like this, where relator's allegations as to the Attorney General's prejudgment were only "on information and belief." There was a strong dissent by Judge Frank, who felt that the district court should at least have heard the testimony offered by relator to show the claimed prejudgment. If the Board of Immigration Appeals denied relief because of the Attorney General's prior designation of relator as one not entitled to relief, its action should be set aside. The situation in such a case would be comparable to one where the Supreme Court were secretly to notify all judges of inferior federal courts that in the future it would reverse all judgments they entered if favorable to certain designated persons. And, in such a case, relator, in Judge Frank's view, has a right to prove, by evidence outside the record, what was the true ground of the Board's action. There is no doctrine, he asserted, that a "court may never go outside such

an official record to discover whether an official himself unlawfully acted on matters outside the record. Having served for a considerable period as an administrative officer, I am fairly callous to the cries of men who denounce all such officers as power-hungry bureaucrats, and I am perhaps unusually aware of the danger to the workings of government if any administrative officer could be dragged into court, to stand trial, on a mere suspicion of impropriety behind the scenes. However, there would be greater danger to democratic government in judicial acceptance of every administrative record as final and invulnerable, no matter how grave and serious the charges against the official." (903).

*Review in criminal proceedings.*—*Panno v. United States*, 203 F. 2d 504 (9th Cir. 1953), involved prosecutions under informations charging defendants with violating an order of the Secretary of Agriculture issued under the Agricultural Marketing Agreement Act of 1937, by handling oranges without a prorated allotment and without reporting information respecting certain sales, as had been required by the Secretary's order. The court held that the defendants could not, in such criminal proceedings, set up as a defense the invalidity of the order which they were charged with violating. The Act provided for direct review, both administrative and judicial, of the order when it was issued, and the statutory review procedure is exclusive. According to the court, it would frustrate all of the objectives of the Act if recalcitrant handlers could compel the government to canvass such questions in respect to every

sale in a prosecution such as we have here.

The question involved in this case—that of whether defendant, charged, in a criminal proceeding, with the violation of an administrative order, can have the legality of the order reviewed in such proceeding—is one of great importance. Since it has, however, just been discussed by the Editor in the American Bar Association Journal, it is felt unnecessary to duplicate in the Bulletin what was said there. Readers are, therefore, referred to *Schwartz, Administrative Law and the Sixth Amendment*, A.B.A.J. (February 1954).

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## LITERATURE

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### *Books:*

French Administrative Law and the Common-Law World. Schwartz, B. With an Introduction by Vanderbilt, A. T. New York University Press, Pp. xxiv, 367, \$7.50. This comparative study by the Editor of this Bulletin contains the first comprehensive attempt to explain the essentials of the French system of administrative law to an Anglo-American audience. It starts with a general survey of the French system from the commonlaw point of view. The author then explains the structure of the administrative courts and the law courts in France. The actual working of a system in which two sets of courts function side by side is analyzed in detail. The problems presented by such a system are seen to be comparable to those that existed in the Anglo-American world when law and equity were separate and competing systems of

justice. To set up separate administrative courts in this country would be, in the author's view, to risk a return to the difficulties that were eliminated by the merger of law and equity. Administrative organization and powers in France are then analyzed. The French administration is seen to possess authority greater than that of its American counterpart, particularly in the field of rule-making. The doctrine of inherent Executive power, rejected by our Supreme Court so strongly in the steel-seizure case, is found to be accepted law in France.

After having thus presented the structure of the French system, the author devotes the major part of the work to an analysis of judicial review in France as compared to review in our own system. The methods of obtaining review and the procedure on review are first discussed. Then the question of availability of review is gone into at some length. French and American law are compared with regard to preclusion of review, ripeness for review, and standing. The same approach is followed for the scope of review. Here, review of procedure, questions of law and fact, jurisdictional fact, and mixed questions of law and fact are gone into. What will be surprising to many is that the French law has had to deal with all of the problems concerning review that have been presented in American law. Practically all important American cases have, as the author shows, their French counterparts. And this enables the author critically to analyze all of the significant American cases from a comparative point of view. In many ways, indeed, the work is as much

a comparative text of American law as it is of the French system.

The remaining portions of the book are devoted to an analysis of public tort liability and a concluding chapter which deals with the relevancy of the French experience to the common lawyer. On the question of tort liability, particularly, is the French law different from our own. A detailed analysis of the Federal Tort Claims Act and its deficiencies leads the author to assert that the French law on this subject is far in advance of ours. In his conclusion, the author first discusses the compatibility of the French system with the rule of law. Then, after rejecting the view that the structure of the French system (with separate administrative courts) should be imported into our law, he analyzes those aspects of the French law that appear to be somewhat in advance of our own. As has been indicated, the constant concern of the book is, not to analyze the French system for its own sake, but to do so in order to throw light upon our own law. To American lawyers, the work will be of most value for its detailed discussion of the leading American cases. They are all dealt with—from *Ware v. Hylton* (1796) to *Dalehite v. United States* (1953)—though the comparative method enables them to be seen in an entirely new light. As Chief Justice Vanderbilt states in his Introduction, analysis of an administrative-law problem through the comparative approach used in the work illuminates the matter where a study of the same problem by itself in a single system of administrative law would prove ineffectual.

#### Articles:

Administrative Law. Schwartz B., 1952 Annual Survey of American Law 109 (also in 28 N.Y.U.L.Rev. 107, January 1953). A survey of administrative-law developments during 1952.

Administrative Procedure and Natural Law. Schwartz, B., 28 Notre Dame Law. 169, Winter 1953. The natural-law bases of the law of administrative procedure. The requirements of due process, upon which such law is based in this country, are seen to stem from these bases. Analysis of the English and French law on the subject appears to confirm this view.

Decade of Administrative Law: 1942—1951. Schwartz, B., 51 Mich. L. Rev. 775, April 1953. A detailed analysis of administrative-law developments during the past decade, which takes as its point of departure the publication of the tenth volume of the *Annual Survey of American Law*. Federal law is emphasized in this survey of all important aspects of the subject. The outstanding feature of the decade is seen to be the continued expansion of administrative authority, accompanied by a correlative restriction of judicial power. Some attempt to provide a counter balance is, however, found in the passage of the APA.

Judicial Control of Administrative Agencies in Indiana. Fuchs, R.F., 28 Ind. L.J. 293, Spring 1953. The second installment of a comprehensive treatment of judicial review in a particular jurisdiction.

Model State Administrative Procedure Act—Analysis and Critique. Schwartz, B.,

7 Rutgers L. Rev. 431, Spring 1953. A comparative analysis of the Act promulgated by the National Conference of Commissioners on Uniform State Laws. The different provisions of the Act are explained and compared with their counterparts in the Federal APA. The article serves as the Introduction to a symposium contributed by the staff of the Review comparing administrative procedures in the different agencies of New Jersey with those prescribed in the Model Act.

Primary Administrative Jurisdiction and the Exhaustion of Litigants. Schwartz, B., 41 Geo. L.J. 495, May 1953. The extremes to which the doctrine of primary jurisdiction have been carried in the federal courts. That doctrine, in the author's opinion, should not apply where the agency cannot grant the full relief sought. Otherwise, there is a needless dualization of justice in many cases.

Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case. Schultz, F.M., 67 Harv. L. Rev. 216, December, 1953. This article deals with one of the most striking provisions for administrative finality in our law, that contained in the so-called finality or disputes clause in government contracts. *United States v. Wunderlich*, 342 U.S. 98 (1951), and its repercussions, both administrative and legislative, are discussed.

Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines In Administrative Law. Newman, F.C., 53 Col. L. Rev. 374, March 1953. A discussion of one of the basic problems arising

in American administrative law, that of the non-binding effect of agency advice. The author proposes a statute to deal with the problem, which would protect those who rely in good faith on administrative rules, orders, or opinions. This so-called "Good Faith Reliance Act" has since been introduced as a bill in the House of Representatives (S. 1752, 83d Cong.)

The So-Called Granger Cases, Lord Hale, and Justice Bradley. Fairman, C., 5 Stan. L. Rev. 587, July 1953. A detailed analysis of *Munn v. Illinois*, 94 U.S. 113 (1877), and its companion cases, among the early landmark decisions of our administrative law.

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#### ATLANTA REGIONAL MEETING, MARCH 3-6, 1954

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The Southern Regional Meeting of the Association will run from the afternoon of March 3, 1954, through the morning of March 6, 1954. General Chairman E. Smythe Gambrell is devoting every effort to make the Regional Meeting in Atlanta a great success for all those who attend it, and to make it a matter of professional interest and development.

This Section is cooperating fully in the effort being put forth, and has arranged to put on a program commencing at 9:45 A.M. on Friday, March 5, and running throughout the morning.

The title of the Section's program is, "Can the Main-Street Lawyer Win a Case Before a Federal Administrative Agency?" Three outstanding speakers have been en-

gaged—Carl McFarland, many times called the “father of the Administrative Procedure Act”, who will speak on the Administrative Procedure Act. Charles S. Rhyne of Washington, D. C., with a distinguished record in the American Bar Association, and who is at home both before administrative tribunals and the courts, will speak on the subject, “Can You Try an Administrative Case Like You Do a Court Trial?” Federal Trial Examiner J. D. Bond, of Arlington, Virginia, an active hearing examiner with the Federal Communications Commission, will speak on the subject, “How Not To Win A Case Before A Federal Administrative Agency—Pitfalls of Administrative Practice.”

A panel will answer questions of the audience—Ashley Sellers of Washington, D. C.; Robert M. Benjamin of New York City; Patricia H. Collins of Washington, D. C.; Reuben Hall of Boston, Massachusetts; Donald C. Beelar of Washington, D. C.; Harold Russell of Atlanta, Georgia; Hugh Fullerton of Washington, D. C.; and Charles E. Smoot of Washington, D. C.

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#### CHAIRMAN'S PAGE

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Many of us didn't notice it at the time, but the Independent Offices Appropriation Act, 1952 (Act of August 31, 1951, 65 Stat. 268, 290) announced the sense of Congress that any service, publication, benefit, privilege, authority, license, registration (and many other items) furnished by any Federal agency “shall be self-sustaining to the full extent possible”. The act authorized the head of any Federal agency to pre-

scribe such fee, charge or price as he should determine to be fair and equitable considering the costs to the Government and value to the recipient.

By circular No. A-25 of November 5, 1953, the Director of the Bureau of the Budget announced a general policy for charging fees for licensing, registration and related activities of Federal agencies under the above act. He announced that matters to be included would embrace certificates of public convenience and necessity issued by the Civil Aeronautics Board, the I.C.C., F.C.C. and Federal Power Commission; registrations with S.E.C.; licenses to classify, grade or weigh agricultural products issued by Department of Agriculture—and a long list of similar items. Agency heads were directed to report to the Bureau of the Budget on or before May 1, 1954, the steps taken to comply with the circular.

The Council and Committee chairmen have been polled on the question whether the Section has jurisdiction, and, if so, whether it should refer the matter to existing committees, or set up a special committee to consider this proposal. The view of that group is about unanimous that the Section has jurisdiction, and by about a vote of three-to-one favors the establishment of a special committee with primary jurisdiction of the problem. Such a committee will be named by the time this Bulletin reaches you, though the Section chairman will be glad to consider for appointment to the committee any section member who communicates with him his desire to serve on the committee.

The Administrative Practitioner's Act has not yet been reintroduced into the 83rd Congress, having been bottlenecked by the Section chairman following a conference (with John D. Randall, Esq. of the Standing Committee on Unauthorized Practice of the Law) with representatives of the American Institute of Accountants—which is the national professional group of the certified public accountants. This conference was held in December as a means of probing to see whether a common ground for supporting the legislation could be found. In January, a conference was held with representatives of the National Society of Public Accountants. Both of these conferences are to be reported to the Council and its instructions obtained for the resolution of any outstanding problems with these respective groups. Thereupon, we contemplate introduction of the bill and aggressive pushing it in Congress.

One of the most important matters of Section business is to be transacted by the Council at the mid-winter meeting in Atlanta, March 6 and 7, 1954. Your vote as a Section member should be communicated to the Secretary—as is set forth as the last item in the present bulletin.

JOHN W. CRAGUN  
Chairman

#### WHAT POSITION SHOULD THE AMERICAN BAR ASSOCIATION TAKE ON THE APPOINTMENT AND REGULATION OF HEARING EXAMINERS IN ADMINISTRATIVE AGENCIES?

The last issue of the Bulletin (pages 10-12) summarized the formal debate at Bos-

ton on S. 1708, 83d Cong., which provides for Presidential appointment of hearing examiners. The August, 1953, issue of the Bulletin (5 Ad. L. Bul. 93) carried the report of the Section's Committee on Federal Trial Examiners, including some statistical information which you will not find elsewhere. The Editor of the Bulletin in the last issue (November, 1953; 6 Ad. L. Bul. 12-18) undertook a general review of the history of the hearing-examiners problem. On an earlier page the present Bulletin sets forth a checklist of problems in connection with the selection, appointment, tenure and regulation of hearing examiners prepared by a committee of the President's Conference on Administrative Procedure, and which may further stimulate your thought in this connection.

At the Boston meeting in August, 1953, at the conclusion of the debate on this matter, it was resolved that the question of the Association's position on S. 1708 be studied further by the Section's Committees on Hearing Examiners, on Administrative Procedure Act, and on Improvement of Administrative Procedures, and that they report to the Council at the mid-winter meeting, authorizing the Council at that time to take a position and ask the House of Delegates to adopt it as the position of the American Bar Association. Also, the Section directed calling the matter to the attention of the membership at large through the Bulletin and soliciting the views of all members of the Section with respect to their preference for the following:

(1) Civil Service Commission regulation, as now provided for;

(2) Presidential appointment and Senate approval of administrative judges, as proposed in S. 1708;

(3) Regulation by an Office of Administrative Procedure to be created as recommended by the Attorney General's Committee; or

(4) Other means which you may specify.

Please direct your response on this to Miss Patricia H. Collins, Secretary, Section of Administrative Law, U. S. Department of Justice, Washington 25, D. C. In order to be assured of your communication being tabulated prior to the Council meeting in Atlanta, you ought to mail your response so that it will be received by Miss Collins on or before February 25, 1954.